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THE
LAW OF RAILROADS

IN
PENNSYLVANIA

INCLUDING THE
LAW RELATING TO STREET RAILWAYS

BY
ALBERT B. ^{Barnes}WEIMER
OF THE PHILADELPHIA BAR

ASSISTED BY
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OF THE PHILADELPHIA BAR

VOLUME III

824
PHILADELPHIA:
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1905.

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PREFACE

During the twelve years which have elapsed since the original publication of this book, the law of railroads and particularly the law of street railways in Pennsylvania, has expanded to a remarkable extent. It is during this period that electricity has come into universal use as a substitute for horse power in the operation of street railways, with the result of a great extension of electric railways into the country districts. The location and construction of such railways has given rise to complicated and novel litigation, and the courts have been called upon in numerous cases to define the respective rights of the railway companies, municipalities and abutting land-owners. The law of negligence has also been expanded to cover the new conditions resulting from increased speed and other dangers incident to the operation of electric cars. These conditions seem to justify the publication of an additional volume of this work. In this volume the statutes of 1905 are included, and the decisions brought down to January first, 1905.

A. B. W.

PHILADELPHIA, Aug. 1, 1905.



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RAILROAD LAW

OF

PENNSYLVANIA

CHAPTER I.

STOCK.

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| 1. Subscription to stock. | 5. Pooling agreement—voting |
| 2. Preferred stock. | stock. |
| 3. Increase of stock. | 6. Forfeiture. |
| 4. Specific performance of sale. | |

Subscription to Stock.

1. Subscriptions to stock of a railroad company are tri-lateral contracts. They are undertakings not only with the company and the Commonwealth, but with all the other subscribers to the stock.

In February, 1891, the defendant subscribed to twenty shares of stock of the plaintiff company of the par value of \$50.00 each, and at the time of the subscription paid an assessment of \$5.00 per share upon them, amounting in all to \$100.00. A short time thereafter he received notice of a second assessment of the same amount, to recover which assessment this suit was brought. In February, 1893, a paid-up certificate of the plaintiff company for two shares of stock was delivered to the defendant duly signed by the president and by the secretary with the corporate seal attached. Plaintiff resisted a call for a second installment, alleging that since the paid-up certificates were delivered to him he was released from his liability to pay for the balance of the stock. It was held that no release could be inferred from the delivery of the certificates,

such release, even if intended, being *ultra vires*. Beeber, J., said: "By his subscription the defendant not only made a contract with the company, but with the other stockholders. It is well settled that subscriptions to the stock of a corporation are trilateral contracts. They are undertakings not only with the company and the Commonwealth, but with all the other subscribers to the stock. We do not think it was within the power of the president and secretary, nor within the power even of the board of directors, to release the subscription of the defendant to the stock of the company without a sufficient consideration. The assets of the company cannot be given away even by the directors, because it would be in violation of their duty to preserve them which they owe to all the other stockholders, to the bondholders, and to the company itself."¹

In an action by a railroad company to enforce the defendant's subscription to the stock of a company, the defendant cannot set up the defence that he was induced by the misrepresentations of a co-subscriber to sign his name to the articles of association without reading them for himself.²

Where a subscription to stock was made by an agent of a railroad company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with a knowledge of such subscription, and, presumably, with a knowledge that without such subscription the loan would have been invalid and contrary to law, the stockholders and directors of the company are estopped from denying or questioning the validity of the subscription, because it was not made in writing and in the prescribed form.³

A person who has agreed in writing to subscribe to the stock of a railroad company cannot defeat the written contract by setting up an agreement made in parol with the agent of the company to the effect that the company would build a station upon the property adjoining the property of the subscriber, and that this had not been done.⁴

1 Braddock Electric Railway Co. v. Bily, 11 Super. Ct. 144 (1899.)

2 Path Valley R. R. v. Brinley, 15 Pa. C. C. R. 339 (1894.)

3 Shellenberger v. Patterson, 168 Pa. 30 (1895.)

4 Philadelphia & Delaware County R. R. v. Conway, 177 Pa. 364 (1896.)

Preferred Stock.

2. A railroad company purchased for cash the shares of stock of several other railroad companies which were fully paid up, and after the merger, the consolidated company issued and substituted new certificates for the shares it acquired by purchase and surrendered and cancelled the latter; it was held that it had the right under the Acts of April 3, 1872, and April 28, 1873, to convert such shares of stock into preferred stock. Weiss, J., said: "It is clear that with the consent of the majority in interest of the stockholders the company may issue preferred stock, not exceeding at any time one-half of its capital stock, which entitles the holder to a preference in the payment of dividends out of the net earnings, not exceeding a prescribed per centum per annum. Having the right to issue preferred stock it is not doing violence to any canon of construction to hold that it may surrender and cancel common stock issued, held and owned by it, and issue instead thereof preferred stock, either as part of a larger issue of that kind of stock, or to that amount only. The conversion of common stock into preferred stock is not an exercise of a power higher or greater than the issue of preferred stock primarily. The Act of May 7, 1887, does not apply to and is not intended to regulate the price or sales of stock by holders and owners. It has the wider and loftier aim of protecting 'the public against the creation of fictitious capital' by railroad companies issuing capital stock 'in excess of the money paid in or of the value of labor done or property received therefor,' and of rendering effective 'the provisions of Sec. 7 of Art. XVI of the Constitution.' " 5

Increase of Stock.

3. A traction company incorporated under the Act of May 22, 1887, is within the prohibition of Art. XVI, Sec. 7 of the Constitution and also within the Act of May 7, 1887, requiring a sworn statement of increase of capital stock to be filed in the office of the Secretary of the Commonwealth. Although the bonus on the increased capital stock had been collected the

5 Com. v. Buffalo & Susquehanna R. R., 11 Dist. 750 (1902); 26 Pa. C. C. R. 635 (1902); 5 Dauph. 209 (1902.)

Commonwealth is not estopped from declaring void such illegal increase.⁶

Where a railroad company has agreed to issue stock to a person who has subscribed for it under an agreement by which he had obligated himself to make a loan to the railroad company and the subscription could not otherwise have been obtained, and it appears that the company agreed to issue the stock without offering to allot any of it among the stockholders, a stockholder claiming to be injured has no remedy in equity to compel the issue of any proportion of such stock to himself. If he has been injured, he has his remedy at law. If, in such a case it appears that no stockholder offered to take, or was willing to take the stock at par, or that it would have sold for more, it seems that no stockholder would have a right to complain.⁷

Where a railroad company purchased all the paid-up capital stock of three other railroad companies and merged with them, exchanging all the stock thus purchased for its own capital stock in like amount, such stock, together with its stock already issued and outstanding represents the amount to which the company may issue its corporate bonds, or other certificates of indebtedness, under the Acts of April 4, 1868, Sec. 8, and May 7, 1887, Sec. 3. The Act of February 9, 1901, providing for the increase of capital stock and indebtedness of corporations broke down the partition wall between paid-up capital stock and corporate debt; under the Act power to increase the indebtedness is limited only by the consent of the stockholders and the necessities of the company.⁸

Specific Performance of Sale.

4. Specific performance of the sale of railroad stock will not be decreed where the party acted in bad faith to the defendants and there was an adequate remedy at law.⁹

6 Com. *ex rel. v. Reading Trac. Co.*, 25 Pa. C. C. R. 156 (1901); 4 Dauph. 82 (1901); Affirmed 204 Pa. 151 (1902.)

7 *Shellenberger v. Patterson*, 168 Pa. 30 (1895.)

8 Com. *v. Buffalo & Susquehanna R. R.*, 10 Dist 363 (1901); 25 Pa. C. R. 274 (1901); 4 Dauph. 135 (1901.)

9 *Rigg v. Reading & Southwestern Str. Ry.*, 191 Pa. 298 (1899.)

Pooling Agreement—Voting Stock.

5. Certain stockholders in a corporation may agree to stand together in carrying out an honest business policy consistent with what they believe to be to the best interest of stockholders, and such an agreement is not an illegal pooling agreement.¹⁰

Where a railroad company deposits stock of another railroad company with a trustee under an agreement in writing, reserving "all the rights, powers and privileges belonging to or incident to the ownership of the stock," including the right to vote the stock, the railroad company has a right to exact a proxy from the trustee so as to vote the stock for the merger of the railroad company whose stock is deposited with another company, such merger being authorized by law and this is the case although the trustee will as a consequence of consolidation be compelled to receive back the stock of the consolidated company instead of stock of the original company.¹¹

Forfeiture.

6. Where persons constituting a firm of brokers made an agreement with the president, directors and stockholders of a street railway company to organize a corporation which would lease the railway company, and the traction company after said incorporation and lease, in payment for such agreement, issued to the brokers a large amount of capital stock, such issue of stock is void and without consideration and may be cancelled at the instance of the Commonwealth; but as the stock had passed into the hands of innocent purchasers for value, the court refused to cancel the stock.¹²

¹⁰ *Rigg v. Reading & Southwestern Str. Ry.*, 191 Pa. 298 (1899.)

¹¹ *Pennsylvania R. R. v. Pennsylvania Co. etc.*, 205 Pa. 219 (1903.)

¹² *Com. ex rel. v. Reading Trac. Co.*, 25 Pa. C. C. R. 156 and 583 (1901); 4 Dauph. 82 (1901); Affirmed in 204 Pa. 151 (1902.) See *Cheltenham v. McCormack*, 178 Pa. 186 (1896.) The Supreme Court refused upon motion to allow the record to be remitted to the court below for the purpose of having the holders of the stock made parties defendant, as complainants allowed three years to elapse after the fictitious increase was made, and delayed for a further period of five years in moving to amend their bill so as to add as parties defendant the real owners of the stock.

CHAPTER II.

BONDS AND MORTGAGES.

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| 7. Subscriptions to bonds. | 10. Repudiation. |
| 8. Contract for sale of bonds. | 11. Coupons. |
| 9. Bonds of other companies. | 12. Foreclosure. |

Subscriptions to Bonds.

7. The Newport and Sherman Valley R. R. Co. executed a mortgage upon its property for the sum of \$125,000 to secure the payment of two hundred and fifty bonds of \$500 each. One of these bonds was subscribed for by the defendant's intestate, William Seager, on September 20, 1893, and was to be paid for July 1, 1894. He died before the time of payment, and the bond was never delivered to him. Subsequently the bond was tendered to the defendant, his personal representative, which was refused. It was held that the agreement did not constitute an enforceable obligation, it was rather an expression of an intention than a contract—being at most but a promise to lend *in futuro* and is *nudum pactum*. Porter, J., said: "The apparent difficulty in this case is due in part to the skill of counsel and in part to the analogy which at first seems to exist between a subscription to bonds and a subscription to capital stock. The latter stands on a totally different basis from the former. An enforceable subscription to capital stock is founded on a signature to the recorded articles of association upon which the corporation is based, under legislative provisions: *Garrell v. Railroad Co.*, 78 Pa. 465. This document clearly indicates to the several subscribers the mutuality of the enterprise. The total joint subscriptions create the new entity. The purpose is thus palpably inherently mutual. More than this however, 'these matters involve not merely private rights but public weal.' *Bucher v. Railroad Co.*, 76 Pa. 312. The subscriptions to stock are recorded with the articles of association and form not only the basis upon the faith of which the

franchise is secured, but also the capital upon the credit of which the company trades. The difference in the status of the two kinds of subscriptions to corporate enterprise is thus clearly marked.”¹

Contract for Sale of Bonds.

8. Defendant agreed to sell and deliver to the plaintiff on or before the 25th day of June, 1898, certificates for 10,000 shares of the capital stock of the York Southern Railroad Company and \$142,000 of the five per cent. bonds of the same company due in 1944. In consideration of the said sale and transfer the plaintiff agreed to pay to the vendor the sum of \$160,000. The vendor further agreed that the railroad company should be free of debt, except its mortgage debt of \$399,950 and its car trust notes, not exceeding \$4,000 and he agreed also that he would pay all the interest due on the mortgage debt and car trust notes and the principal and interest of all the floating debt of the company up to the time of delivery, June 25, 1898. To make sure of the payment of these items it was further agreed that the vendee, the plaintiff, might retain out of the purchase money so much as was sufficient to make the payment. The vendor refused to perform his part of the contract of sale, and declared the same terminated. A bill for specific performance was filed averring *inter alia*, that after the execution of the contract of sale, the defendant sold and delivered the said stock and bonds to certain other of the defendants and that these defendants when they bought the bonds had knowledge and were advised of the previous contract made by Walworth with the plaintiff and colluded with Walworth for the delivery of the stock and bonds in fraud of plaintiff's rights. The lower court refused a special injunction and subsequently sustained the defendant's demurrer and dismissed the bill for the reasons: That the contract was too uncertain and indefinite in its terms, that the contract lacked mutuality and was loaded down with conditions contradictory and incapable of performance, that a bill for specific perform-

¹ *Newport & Sherman Valley R. R. Co. v. Seager*, 7 Super. Ct. 268 (1898); affirming 19 Pa. C. C. R. 465 (1897.)

ance was an appeal to the conscience of a chancellor who would not order its performance if it is hard or unconscionable; that the bill did not show irreparable injury; that the securities had been transferred to the parties and that specific performance would not be decreed in Pennsylvania for the sale of stocks and chattels. The Supreme Court reversed the decree of the lower court and overruled the demurrer. Green, J., said: "We find ourselves unable to agree with any of these conclusions. There is not the least element of doubt or uncertainty as to what this contract is and means. It means just what it says, and what it says is so plainly and clearly expressed that a description of its meaning would be merely a repetition of its words. The subsequent sale and delivery of the securities to other parties in disregard of the earlier contract with the plaintiff is not of the least consequence as a defence, most especially when the bill avers that these parties had knowledge of the prior contract with the plaintiff and they are made parties to the bill and are asked to be enjoined. We do not discover any want of mutuality in the contract. If the vendor had performed his part of the contract and the vendee had refused to take the securities upon tender of them being made we know of no reason why specific performance could not be decreed against the plaintiff. The contention that the contract is uncertain because the amount of the interest on the mortgage bonds and the car trust notes is not stated and the amount of the floating debt of the company is not given, and therefore the contract does not disclose how much money is to be paid for the securities is of no force. The amount to be paid is fixed and definite, \$160,000. There is no amount to be deducted, unless the vendor defaults in his agreement to pay the interest on the bonds and note and the principal and interest of the floating debt and such default is not to be presupposed. But if it occurs the vendor can show what the amounts to be deducted are and thus these amounts can be rendered certain, and that is certain which can be made certain. The only other contention of any importance is the one that bills in equity will not lie in Pennsylvania for the specific performance of contracts for the sale of chattels. While this is true as a general rule it is not true where the

articles sold are of such a nature that they cannot be purchased in the market. This contract is for the sale and purchase of almost the whole of the bonds and stock of this particular company. These securities cannot be had nor obtained except under and by force of this particular contract. They cannot be bought in the general market because they do not exist. Outside of this contract there are but 2,000 shares of stock and \$8,000 of bonds; hence it is not possible for the plaintiff to obtain the stocks and bonds which the defendant, Walworth, agreed to sell him except by the specific performance of this contract. This consideration constitutes a well established exception to the general rule which denies specific performance to executory contracts for the sale of chattels. This whole subject was discussed in the opinion of this Court delivered by Clark, J., in the case of Goodwin Co.'s Appeal, 117 Pa. 514, and the exception to the rule as above stated was clearly recognized and enforced. On page 534 it is said in the opinion: 'The same general principles govern in contracts for the sale of stocks of this character as in the sale of other personal property; if the breach can be fully compensated equity will not interfere; but when notwithstanding the payment of the money value of the stock the plaintiff will still lose a substantial benefit and thereby remain uncompensated, specific performance may be decreed: Waterman on Specific Performance, Sec. 19. . . . The doctrine has in some cases been carried to this extent that if a contract to convey stock is clear and definite and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance may be decreed.'

"With reference to the contention that there is an adequate remedy at law and that the bill does not show an irreparable injury it is enough to say that under the case disclosed by the bill the plaintiff has no remedy at law, and that the plaintiff's injury is necessarily irreparable in every equitable sense if the plaintiff does not acquire the bonds and stocks which they purchased and aver their readiness and willingness to pay for. It was these bonds and stocks which they bought and which they had a perfect legal right to buy. If they cannot have them their injury is necessarily irreparable because they lose the

very subject-matter of their contract. A money consideration even if it could be obtained, is no substitute. The decree of the court below is reversed and the demurrer is overruled."²

Bonds of Other Companies.

9. The Act of April 23, 1861, P. L. 410, authorizes railroad companies to purchase the stocks, bonds, etc., of other railroad companies where the roads are not parallel or competing.³

Repudiation.

10. Where a railroad company issues its stocks and bonds to a trust company in consideration of the latter advancing moneys to a contractor to build the road and insure the contract, the railroad company cannot repudiate its bonds after the trust company has in part performed the contract and then became insolvent; nor will the railroad company be permitted to recover its bonds if it appears that all of the trust company's obligation under the guaranty have not been paid. The action of the railroad company in officially asserting that the bonds are valid outstanding securities estops it from repudiating them.⁴

When one street railway company has purchased all the franchises, etc., of another company and as part consideration for the purchase has covenanted to pay a mortgage which is a lien on the property, the purchasing company cannot, after it has obtained possession of the property, deny its liability on the mortgage on the ground that it was without consideration.⁵

Coupons.

11. Although the holder of coupons which are secured by a trust mortgage may not proceed against the mortgaged

² Northern Central Railway Co. v. Walworth *et al.*, 193 Pa. 207 (1899); 13 York 78 (1899), reversing 12 York 121 (1899.)

³ Northern Central Ry. v. Walworth, 193 Pa. 207 (1899); 13 York 78 (1899), reversing 12 York 121 (1899.)

⁴ Bucks County Ry. Co. v. Guarantors Finance Co., 23 Pa. C. C. R. 101 (1899.)

⁵ Old Colony Trust Co. v. Allentown and Bethlehem Rapid Transit Co., 192 Pa. 596 (1899.)

property, except through the trustee, he may bring suit upon the coupons and recover judgment thereon; as to other property not conveyed to the trustee the bondholder may treat himself as an individual creditor and proceed to recover judgment for the amount of his unpaid coupons, execution upon the judgment, however, cannot be directed against any property covered or embraced in the mortgage to the trustee.⁶

To a suit on coupons, the affidavit of defence alleged that the bonds with interest coupons and the mortgage by which payment of them was secured was made and executed in New Jersey and related to property in New Jersey, and that the law governing defendant's liability should be that of New Jersey.

It was held in an action on such coupons brought in a Pennsylvania court that notwithstanding the fact that the coupons were payable in New York, the law of New Jersey requiring a foreclosure sale of the mortgaged premises would be applied. It is the law of New Jersey that a mortgage must first be foreclosed before suit can be brought on the bond for the deficiency; and this law applies to overdue interest coupons. The construction of this law of New Jersey has been adopted in Pennsylvania (*Sea Grove B. & L. Ass'n v. Stockton*, 148 Pa. 146) as to a mortgage debt, when relief on a New Jersey contract was sought in a Pennsylvania court, and the same principle is applicable to the coupons.⁷

The statute of limitations cannot be set up to prevent a recovery upon coupons which have not been detached from bonds.⁸

Foreclosure of Mortgage.

12. A mortgage executed as security for the faithful compliance with the terms of a lease by a street railway company to an electric light company, the lessee covenanting to keep the leased property in good repair and restore the same in good condition at the expiration of the lease, to supply the lessor

6 *Ritter v. Conshohocken Ry.*, 18 Montg. 61 (1902); 11 Dist. 703 (1902.)

7 *Newman v. Brigantine Beach R. R.*, 15 Pa. C. C. R., 625 (1894); 3 Dist. 833 (1894.)

8 *Philadelphia Trust Co. v. Philadelphia & Erie R. R.*, 160 Pa. 590 (1894.)

with power to run its cars, to pay net receipts to the lessor to be applied to payments of coupons on lessor's bonds, to pay taxes, etc., may be foreclosed where the lessee defaulted in its covenants by failure to rebuild the power house after being destroyed by fire; to pay expenses, taxes, etc., which the lessor paid; and by applying certain of the net receipts to betterments and improvements.⁹

Where a person leases rolling stock to a railroad company for a certain term at an annual rental with an option to purchase at a stipulated price at any time during the term, payments of rent to be credited on account of the purchase money, the contract is a bailment and a sale under the foreclosure of a mortgage prior in date to the lease, will not pass title to such rolling stock.¹⁰

If the purchaser of the property of a railroad company sold under foreclosure proceedings has had possession for eight years of a locomotive claimed as a part of the property sold, the statute of limitations will protect such possession against a person claiming that the locomotive had been merely leased to the mortgagor, and was not covered by the mortgage under which the foreclosure proceedings were instituted.¹¹

Where the stockholders and bondholders of a railroad company, with the assent of the company, adopt a plan of reorganization by which certain income mortgage bonds provided for in outstanding scrip certificates are converted into preferred stock, and it appears that no time is mentioned in the certificates within which they are to be presented for conversion into bonds, the railroad company cannot set up as a defence in an action against it on a certificate, the plan of reorganization, nor the delay of the plaintiff in not presenting his certificate until after the income bonds had been retired.¹²

Where certain persons acting as a committee to reorganize a railroad company are given authority to "limit the time of

9 *Gettysburg Electric Ry. v. Electric Light, Heat & Power Co.*, 200 Pa. 372 (1901.)

10 *Collins v. Bellefonte Cent. R. R.*, 171 Pa. 243 (1895.)

11 *Altoona & Beech Creek R. R. v. Pittsburg, Johnstown, Ebensburg & Eastern R. R.*, 203 Pa. 102 (1902.)

12 *Lennig v. Choctaw, Oklahoma & Gulf R. R.*, 15 Super. Ct. 510 (1901.)

acceptance," and "extend the time in their discretion," to "supply defects in said plan necessary to carry it out properly and effectively," and "to delegate any necessary authority as well as discretion" and by virtue of this authority delegated to the chairman of the committee the discretion to extend the time for acceptance, the chairman in the absence of any requirement that the extension of time shall be in writing may make an oral extension of the time to a stockholder, and such a stockholder has the right, even after the expiration of the time limited in the agreement to join in the reorganization plan.¹³

The Acts of May 5, 1876, and March 23, 1877, which give equity jurisdiction to foreclose mortgages of railroad companies applies to street railway companies.¹⁴

¹³ *Raleigh v. Earle*, 185 Pa. 78 (1898), affirming 18 Pa. C. C. R. 99 (1896); 5 Dist. 111 (1896.)

¹⁴ *Old Colony Trust Co. v. Allentown and Bethlehem Rapid Transit Co.*, 192 Pa. 596 (1899.)

CHAPTER III.

STATUS OF FOREIGN CORPORATIONS.

13. Registration.

14. Holding Stock of Domestic Corporation.

Registration.

13. Registration by a foreign corporation after the work is completed and before suit will not confer a right of action. Full performance of the contract by the foreign corporation is not sufficient to prevent recovery from a defendant, who retains the price or value of it, when the suit is directly upon the contract. The rule that one may recover upon a forbidden contract if he can prove his case without giving it in evidence does not apply to illegal contracts prohibited by statute on the ground of public policy, nor does the law of estoppel apply to contracts of foreign corporations doing business contrary to the Act of April 22, 1874.¹

The purpose of the Act of April 22, 1874, P. L. 108, relating to registration, is to bring foreign corporations doing business in this State within the reach of legal process. Such purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. Nothing short of a registration before the contract that it seeks to enforce is made can give a foreign corporation a right of action. Thus, where a foreign corporation enters into this State and engages in the work of constructing an electric railway during a period of six months, and in the prosecution of this business employs a great many men and nearly all of its capital and does not file a statement in the office of the Secretary of the Commonwealth as required by the Act of 1874 until two months after the work was

¹ Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Str. Ry., 7 North. 337 (1901.)

completed although before suit was brought, it cannot maintain an action for labor and materials furnished by it during the progress of the work.²

In *Shepp v. Schuylkill Valley Traction Co.*³ it was held that the purchase of stock of a Pennsylvania corporation and the voting of it for directors by a foreign corporation is not "doing business" in this Commonwealth within the meaning of the Act of April 22, 1874, which requires a statement to be filed with the Secretary of the Commonwealth. The purchase of stock of the Pennsylvania corporation was authorized by its charter, and is not forbidden by the laws of this State. The rights and powers of the foreign corporation are those of a stockholder only. It is not the corporation in the sense of that term as applied to the management of the corporate business or the control of the corporate property.

Merely making a written executory agreement by a foreign corporation for the future construction of a street railway in the State is not "doing business" in the sense contemplated by the Act of April 22, 1874. When the contract is made between two foreign corporations the mechanical act of affixing the respective seals will not be presumed to have taken place here.⁴

Holding Stock of Domestic Corporation.

14. A foreign corporation may acquire the majority of stock of a domestic street railway company; if the corporation is acting *ultra vires*, no one except the State of its creation or the Commonwealth of this State can raise the question.⁵

² *Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Pass. Ry. Co.*, 204 Pa. 22 (1902.)

³ *Shepp v. Schuylkill Valley Traction Co.*, 17 Montg. 52 (1901.)

⁴ *Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Str. Ry. Co.*, 7 North. 193 (1900.)

⁵ *White v. Ryan*, 15 Pa. C. C. R. 170 (1894.)

CHAPTER IV.

EMINENT DOMAIN—GENERAL PRINCIPLES.

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| 15. Definition. | 19. Taking for Water. |
| 16. How Exercised. | 20. Turnpike Companies — Telephone Lines. |
| 17. Land Can Only be Taken for Public Use. | 21. Nature of Estate Acquired. |
| 18. Necessity for Taking. | |

Definition.

15. The true definition of eminent domain under the Pennsylvania constitution is, "The sovereign power vested in the State to take private property for public use, providing first a just compensation therefor."¹

How Exercised.

16. The appropriation of lands under the exercise of the right of eminent domain, must be the act of the corporation by a resolution adopted by the president and board of directors, and not the act of the president alone without corporate action.²

Land Can Only be Taken for Public Use.

17. A railroad company organized under the Act of April 4, 1868, will not be restrained under the Act of June 19, 1871, P. L. 1361, in the exercise of its right of eminent domain from locating its road on the land of another, unless it is clearly shown that such corporation is engaged in a private and not a public enterprise.

The Millersburg Railroad Company located and was about to construct a line of railroad across the plaintiff's land. The

¹ Trenton Cut-Off R. R. & Pennsylvania R. R. v. Newtown Elec. Str. Ry., 8 Dist. 549 (1899), per Yerkes, J.

² Schaadt v. Ironton R. R., 22 Pa. C. C. R. 101 (1898); 6 North. 333 (1898.)

plaintiff alleged that said railroad is proceeding in violation of law to construct and locate the road for private and not for public use. Reed, P. J., said in dissolving the preliminary injunction and allowing the construction of the road:

"The question of what constitutes a public use is one of great practical difficulty, and no inflexible rule can be laid down for its determination. Where the exercise of the right of eminent domain is challenged on this ground, each case must furnish its own rule. The use, which is public, however, possesses some general characteristics which distinguish it from a private one. In the former the right is vested in the general public, and may be enforced by law by each individual member of society. It is a right held in common, and to be enjoyed on the same terms and conditions by all who may have occasion to avail themselves of it. But it does not follow that the use or benefit must be available to the whole public, or to any considerable portion of it. Nor that all persons must be benefited alike. The fact that the use may contribute largely to the advantage of some private enterprise does not detract from its public character. The general welfare of the people of the Commonwealth is promoted by private business enterprises which develop the resources of the State and add to the general wealth and prosperity. Convenient and adequate means of transportation are essential to their existence, and the common carrier which supplies them with such means is serving a public interest and use, and not a private business enterprise. . . . We think the right of a common carrier to construct branches and spurs to connect a particular business concern or establishment with its main line is well settled in this State, and, on principle, it would seem that the same thing may be done by an independent corporation clothed with a like franchise. . . . Where the trade and travel are believed to be sufficient to warrant the construction and equipment of a railroad to accommodate them, the courts ought not to be readily moved to enjoin the enterprise on the allegation that it serves no public need, or does not tend to promote the public welfare." ³

3 Rochester & Pittsburg Coal & Iron Co. v. Berwind-White Coal Mining Co., 24 Pa. C. C. R. 104 (1900.)

The question whether a railroad was a *bona fide* public road, or a private road and not entitled to the right of eminent domain must be determined, under the Act of 1871 by the situation of affairs at the time the charter was granted whether it could serve a public purpose.

The fact that the railroad did not perform its public duties is not sufficient to deprive the road of the right of eminent domain; it is only ground for forfeiting its charter.⁴

Necessity for Taking.

18. A railroad company operating a single track railway cannot by a bill in equity restrain another railroad company from taking some of the plaintiff's land, where it appears that at the time the bill was filed the plaintiff was not engaged in laying a double track, and neither the bill nor the proofs show that a second track was necessary and it conclusively appears that the occupancy of the land was important to the defendant for the proper exercise of its corporate powers and privileges.⁵

Under the Act of March 17, 1869, giving railroad companies the right to take land by eminent domain in improving their road, a railroad company may condemn land for a second track, which deflects from the original route one and one-half miles, runs around a mountain through which the original route is tunneled and makes the second track over two miles longer than the other, where it appears that the detour will greatly facilitate the movement of trains, and lessen the danger to traffic by cutting down a grade of sixty-seven feet per mile to thirty-seven feet, and relieving the company of the necessity of using a helper engine between the two points, the route designated being the only one between the two points which will provide an easier grade than that of the original line. Under the Act of April 3, 1872, relating to straightened or improved lines of railroad, the company will be permitted to retain the use of the original track while operating the new track.⁶

⁴ Windsor Glass Co. v. Union R. R., 32 Pitts. 111 (1901.)

⁵ Pennsylvania Schuylkill Val. R. R. v. Schuylkill Nav. Co., 167 Pa. 576 (1895.)

⁶ Tissue v. Pittsburg & Connellsville R. R., 12 Dist. 175 (1902.)

Taking for Water.

19. Under the general railroad law of 1849 and its supplements, a railroad company has the right to condemn land to be used as a water station or reservoir for the storage of water for use in the operation of its road even although the land to be condemned does not abut on the railroad company's right of way. "Water is a material in one sense of the word, just as gravel or timber, but the Act of 1849 as well as the Act of 1856 evidently contemplated the use and storage of water by the railroad as a necessary part of the construction of the road for the purpose of running its locomotives. A water station necessarily means a place for the storage of water for use of the railroad. What those stations may be and how far they may extend is not declared in the Act. Often, perhaps generally, the reservoirs for the storage of water for use of the railroad locomotives are wooden or iron tanks but not necessarily so. Nor does the Act of Assembly provide or intimate how or what they shall be. It must be left to the reasonable discretion of the railroad authorities, governed by the necessities of the case. The Act of 1856, which provides for the tender of a bond as compensation for the taking of lands and of water and of water rights or materials is not conclusive, but it is a legislative construction that in the right to construct water stations, the Legislature meant to include the taking of waters and water rights under the power of eminent domain. It might be well for the Legislature to define more clearly the rights of railroad companies in regard to water stations and waters and water rights; but in the case before us it seems to us that in making its reservoir—a reservoir being a necessary part of a water station—the defendant company is exercising a reasonable discretion in the manner in which it proposes to erect the works to meet a pressing necessity for the operation of the road." 7

Turnpike Companies—Telephone Lines.

20. A turnpike company and a trolley company, occupying

7 *Smithko v. Pittsburg & Western Ry.*, 5 Dist. 543 (1896); 27 Pitts. 17 (1896.)

the turnpike under a lease, have a property interest in the road which cannot be interfered with or encumbered under Art. I, Section 10 of the Constitution without just compensation first made or secured. The construction of a telephone line along the side of a turnpike the middle or side of which is occupied by a trolley company imposes an additional servitude upon the turnpike and trolley companies and will be enjoined until just compensation to them is made or secured.⁸

Nature of Estate Acquired.

21. One who owns the land on both sides of a right of way of a railroad cannot, under the Act of April 16, 1838, construct an overhead bridge without the consent of the railroad company. A railroad company in the exercise of its right of eminent domain condemned for the uses of its railroad a certain strip of ground and built a railroad thereon. The acquisition of this strip of ground completely severed the lot of plaintiff. Plaintiff used the ground lying on both sides of the railroad for the handling and storage of coal and wood. In the prosecution of this business he made use of the crossing at grade over the railroad but was desirous of acquiring a second crossing over the railroad not at grade but by means of a structure elevated in the air. It was not the purpose of the plaintiff, however, to abandon the use of the crossing at grade as he intended to make use of both crossings.

McCarthy, J., in refusing to allow the elevated structure, said:

"It may be taken as the well settled law of this Commonwealth that where a railroad company condemns land for railroad purposes, and the damages for such taking have been assessed and paid, the railroad acquires a complete title in the nature of a base or conditional fee, terminable on the cesser of the use for railroad purposes in the surface of the land, and so much of the land beneath the surface as may be necessary for the support of the surface, and coupled with that interest it acquires the right to exclusive possession of the land so

⁸ *Lancaster & Susquehanna Turnpike Road Co. v. Columbia Telephone Co.*, 10 Dist. 322 (1900.)

taken and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. And the plaintiff has no right either to construct or maintain an overhead bridge across the railroad at any elevation without the prior consent of the railroad company."⁹

Where a railroad company makes an actual survey on the ground for a right of way, and this is followed by selection and proper adoption by the directors of the company such action makes a fixed and definite location and fastens a servitude upon the property affected thereby. The railroad company acquires a conditional title which ripens into an absolute one when compensation is made or a bond filed. If after the location of the right of way, but before compensation is made, or bond filed, the owner attempts to sell the land, he cannot give a good marketable title.¹⁰

⁹ *Speese v. Schuylkill River East Side R. R. Co.*, 23 Pa. C. C. R. 17 (1898); 8 Dist. 584 (1899); see s. c. 201 Pa. 568 (1902.)

¹⁰ *Johnston v. Callery*, 173 Pa. 129 (1896); 27 Pitts. 123 (1896); *Johnston v. Callery*, 184 Pa. 146 (1898); 29 Pitts. 123 (1898.)

CHAPTER V.

CONDEMNATION PROCEEDINGS.

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| 22. Bonds—Effect of Filing. | 28. Appointment of Viewers. |
| 23. Bonds—Approval of. | 29. Duties of Viewers. |
| 24. Bonds—Foreign Surety Company. | 30. View of Premises. |
| 25. Bonds—Question of Title. | 31. Notice to Land Owners. |
| 26. Bonds—Action on. | 32. Appeals. |
| 27. Bonds—Appeal. | 33. Lien Creditors. |
| | 34. Statute of Limitations. |

Bonds—Effect of Filing.

22. Where a bond has once been filed and the landowner's rights have thereby become divested, the court has no power to order the discontinuance of the condemnation proceedings at the instance of the railroad company.¹

Questions as to the validity of the road and the right of the company to take the land cannot be raised upon exceptions to the bond.²

Bonds—Approval of.

23. Upon a petition by a railroad company to approve a bond, questions as to the legal or constitutional power of the company to take the land will not be determined. The form of the bond and adequacy of the security only will be considered, unless perhaps the absence of authority should clearly appear in the recitals.³

Bonds—Foreign Surety Company.

24. A foreign surety company will not be accepted as surety for a railroad company on a land-damage bond.⁴

1 *Fischer v. Catawissa R. R.*, 175 Pa. 554 (1896.)

2 *West Side Belt R. R. Co's Bond*, 33 Pitts. 213 (1902.)

3 *Bangor & Portland R. R. Co.'s Petition*, 8 Dist. 65 (1898); 12 York 113 (1898); 6 North. 317 (1898.)

4 *Altoona & Beech Creek Terminal R. R. Co.'s Bond*, 24 Pa. C. C. R. 561 (1901.)

Bonds—Question of Title.

25. A bond given by a railroad company in condemnation proceedings will not pass title to the easement of a right of way, where the entry of the railroad company is in clear violation of the covenants in an agreement with the landowner, and the latter has a standing in equity to enjoin the proceedings until the covenants are performed, or the contract is rescinded.⁵

Bonds—Action on.

26. Where the sureties on a bond given by the railroad company to secure land damages, intervene in the condemnation proceedings they cannot allege as a defense in an action on the bond, that the dissolution of the railroad company prior to the condemnation proceedings abated the action, and discharged the sureties.⁶

An action upon a right of way bond cannot be maintained where it appears from the statement of claim that a judgment had been entered against the railroad company and in favor of the plaintiff, for the taking of the right of way, although the statement avers that such judgment was improperly and fraudulently procured under an alleged agreement of the parties without trial or submission of evidence.⁷

Bonds—Appeal.

27. An order fixing the amount of a bond in railroad condemnation proceedings is interlocutory in character and no appeal lies from it.⁸

Appointment of Viewers.

28. Where the only objections to the appointment of viewers in condemnation proceedings are based on matters of fact affecting title, which are not admitted, the Supreme Court on

5 *Semple v. Cleveland & Pittsburgh R. R.*, 172 Pa. 369 (1896); 26 Pitts. 240 (1896.)

6 *Keller v. Harrisburg & Potomac R. R.*, 161 Pa. 504 (1894.)

7 *Harris v. Schuylkill River East Side R. R.*, 159 Pa. 468 (1894.)

8 *Pittsburg, Carnegie & Western R. R. v. Gamble*, 204 Pa. 198 (1902.)

certiorari, will not reverse the order of the lower court overruling the objections.⁹

The Act of June 8, 1893, authorizing the appointment of viewers to assess damages without previous attempt to settle with the owner, where title is in dispute, allows the corporation to proceed in such case but does not contemplate the settlement of the controversy on exceptions to such proceedings. Jurisdiction is conferred under the Act if there is a real controversy. Where the record does not show that the route passes through the curtilage of a dwelling, which is prohibited by the Act of February 19, 1849, and it is denied, the remedy is by injunction and not by exceptions to the petition.¹⁰

Duties of Viewers.

29. The quantity of land which a railroad company is allowed to appropriate is not determined by the viewers; it is not their duty to fix the lines of the appropriation; the railroad company under its right of eminent domain surveys and appropriates the land within the limits fixed by the statute and points out the boundaries. The viewers assess the damages for the land taken according to the boundaries thus fixed by the company.¹¹

View of Premises.

30. The report of viewers appointed under the Act of February 19, 1849, must be based upon personal observation, and their report will be set aside, when the view was made at a time when the ground was covered with snow, and they determined the character, quality and value of the land from the evidence of witnesses called before them.¹²

Notice to Land Owners.

31. If a landowner has notice of the time and place of meeting of viewers, he is bound by the report of viewers after the

9 *Bredin v. Pittsburgh & Western Railway*, 165 Pa. 262 (1895.)

10 *Lehigh & New England R. R. Co.'s Petition*, 7 North. 77 (1899.)

11 *Zahn v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 184 Pa. 66 (1898); 28 Pitts. 248 (1898.)

12 *Jeffries v. Tuscarora R. R.*, 9 Dist. 17 (1899.)

lapse of many years of silence. A railroad company occupied land for many years without objection from the landowner. In an action to set aside the appointment of viewers and proceedings thereunder, the landowner denied that a person duly served with notice as his agent was such in fact, but did not aver that he did not acquire actual knowledge of the proceedings and occupancy thereunder which was open and notorious in its nature; it was held that the proceedings would not be set aside.¹³

Appeals.

32. Where an appeal has been taken from the report of viewers by having the prothonotary note the fact of appeal upon the docket the appeal will be allowed. It is not necessary in order to perfect an appeal to file a separate paper.¹⁴

On an application for an appeal from an award of arbitrators in *forma pauperis* under the Act of June 16, 1836, the court will permit the appeal without the payment of costs.¹⁵

Lien Creditors.

33. Although damages which are assessed for the appropriation of land by a railroad company under the right of eminent domain are payable to the owner of land, even if he be insolvent, still lien creditors upon application to the equity powers of the court may have the fund apportioned to their liens.¹⁶

Statute of Limitations.

34. The Act of April 17, 1866, limiting the time within which action may be brought against railroad companies for damages for right of way or the use and occupancy of land is avoided by Sec. 21, Art. 3 of the Constitution of 1874. In an

13 *Peach Bottom Ry. Co. v. McAlister*, 7 Super. Ct. 574 (1898); affirming 11 York 75 (1897.)

14 *Brown v. Southwest Pennsylvania Ry.*, 32 Pitts. 92 (1901); 10 Dist. 693 (1901); 25 Pa. C. C. R. 343 (1901.)

15 *Sinnot v. Delaware County & Philadelphia Pass. Ry.*, 7 Del. 599 (1900); 9 Dist. 705 (1900.)

16 *Mack v. Eastern & Northern R. R.*, 7 North. 318 (1900); 10 Dist. 102 (1900.)

action to recover damages for land taken by a railroad company the entry was made upon plaintiff's land in 1870, the road completed in 1871 and proceedings begun by petition for the appointment of viewers in 1899. It was held that the action was not barred by the five years' statute of limitations contained in the Act of April 17, 1866.

Aliter if the bar of the statute had been complete at the time of the adoption of the Constitution.¹⁷

Where a railroad company carries its tracks across a street by bridges and viaducts, the right of action of a property owner on the street is complete not later than the time when the work commenced, had progressed to such an extent as to obstruct ingress and egress to and from the property to the street; and if he permits six years to expire after that time before bringing suit, his claim will be barred by the statute of limitations.¹⁸

¹⁷ *Dietrich v. Southern Pennsylvania Ry. & Mining Co.*, 14 York 1 (1900.)

¹⁸ *Cass v. Pennsylvania Co.*, 159 Pa. 273 (1893.)

CHAPTER VI.

DAMAGES IN CONDEMNATION PROCEEDINGS—EVIDENCE.

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| 35. General Rule. | 47. Injuries to Special Business. |
| 36. Separate Tracts. | 48. Profits of Business. |
| 37. Tenants. | 49. Evidence Admissible. |
| 38. Taking of Right of Way. | 50. Evidence Inadmissible. |
| 39. City Lots. | 51. Interest. |
| 40. General Appreciation of Property. | 52. Costs. |
| 41. Depreciation of Property. | 53. Qualification of Witnesses. |
| 42. Injuries to Gas Plant. | 54. What Witnesses Are Competent. |
| 43. Injuries to Stream. | 55. What Witnesses Are Incompetent. |
| 44. Culm Piles. | 56. Cross Examination. |
| 45. Risks from Fire. | |
| 46. Turnpike Company. | |

General Rule.

35. Where land has been taken by a railroad company under the right of eminent domain the owner is entitled to recover what the property of which he has been deprived would have produced to him, not what it might be worth to the person taking it.¹

The correct rule in estimating the damages is to take the difference of the entire property or tract as a whole, unaffected as it was before the railroad was laid upon it, and as it is affected by the railroad after it is finished or completed. Evidence of the value of the property before the completion of the road is incompetent.²

The measure of damages for the location of a railroad through one's land is the difference in the market value before and after the construction of the railroad, and this includes all the elements of depreciation and represents the

¹ *Lehigh Coal Co. v. Wilkes-Barre & Eastern R. R.*, 187 Pa. 145 (1898);
² *Kulp* 235 (1898), reversing 8 *Kulp* 540 (1897.)

² *Hoffman v. Bloomsburg & Sullivan R. R.*, 157 Pa. 174 (1893.)

whole loss. Separate items are to be considered not as distinct items of loss, but as they affect the market value. These items embrace the diversion of surface water, the invasion of privacy, the deprivation of means of access, the burden of additional fencing, the change of roads, the imminent danger of fire not resulting from negligence, and like matters, which are to be taken into consideration as affecting the market value of a property as a whole. The inquiry is limited as to whether it will be prejudicial or advantageous to the property as such and not to the owner in any special use he may make of it.³

If a part only of the property is taken, the measure of damages is the difference between the value of what remains and the value of the whole before the injury.⁴

Where a railroad company changes the grade of a street in consequence of which an abutting land owner's property depreciates in value, the railroad company is liable, and the owner should be compensated in the amount of the depreciation in the value of his property.⁵

Evidence of particular sales is inadmissible to establish mar-

3 *Hewitt v. Pittsburgh, Shawmut & Northern R. R. Co.*, 19 Super. Ct. 304 (1902.)

The universal practice in Pennsylvania in regard to the assessment of damages, has been to assess all the damages done or likely to be done to the premises through which the railroad passes, including the use and occupation of the ground occupied; the materials taken from the land adjoining the limits of the right of way; increased danger by fire, inconvenience from noise, additional burden imposed upon the land by reason of fencing, inconvenience of farming parts of land separated from each other by the railroad; increased difficulties in reaching barns and other buildings in the ordinary use of the property, damages likely to result from drainage and other causes arising from the construction of the road and other similar disadvantages. These and such as these have always been held as proper subjects of inquiry by viewers, and on appeal from their award by juries, in estimating the difference between the value of the land as it was before the railroad was constructed and its value after the construction.—*Robinson v. Pennsylvania R. R.*, 6 Super. Ct. 383 (1898), per Beaver, J.

4 *Spring City Gas Light Company v. Pennsylvania Schuylkill Valley Railroad*, 167 Pa. 6 (1895); 11 Montg. 53 (1895), reversing 10 Montg. 69 (1894.)

5 *Hare v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 10 Super. Ct. 647 (1899.)

ket value; the general selling price in the neighborhood at the time is the test of value. Nor is the market value necessarily the price it would command in a forced sale by public auction. It is estimated upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood.⁶

A railroad company after appropriating a right of way and filing a bond afterward abandoned this location and selected another in the same tract; it was held that while the appropriation by the first taking was complete as soon as the railroad company filed its bond, the market value of the property was to be determined not only by the taking but also from the construction and operation.⁷

Separate Tracts.

36. In order that two properties having no physical connection may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other.⁸

Plaintiff owned land which was taken by defendant who constructed a railroad through it. Plaintiff had erected on the land a large paper factory, a mansion house with stables, tenement houses for workmen, pulp mills and all the accessories for a proper operation of the plant. There was a stream of pure water on the land, also a reservoir for retaining pure water. Prior to the erection of the paper mill the Reading Railroad had been located through the land upon an elevated structure, having a right of way thirty feet wide, and long afterward plaintiff conveyed to the same company a strip adjoining this right of way for railroad purposes. The mill was on one side

6 *Hewitt v. Pittsburgh, Shawmut & Northern R. R.*, 19 Super. Ct. 304 (1902.)

7 *Rudolph v. Pennsylvania Schuylkill Valley Railroad Company*, 186 Pa. 541 (1898); 14 Montg. 150 (1898.)

8 *Kossler v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 208 Pa. 50 (1904); *Rudolph v. Penna. Schuylkill Valley R. R.*, 186 Pa. 541 (1898.)

of this right of way and the stream and reservoir on the other. In holding that the conveyance was not a severance of the tract into two distinct parcels of land Dean, J., said: "The conveyance to plaintiff is of the land as an entirety and it was in fact in one tract. The Reading Railroad appropriated a right of way through it and long afterwards plaintiff conveyed to the same company a strip adjoining this right of way for railroad purposes. The property was purchased by plaintiff for a distinct purpose, the manufacture of paper; the whole tract was as necessary to his purpose as any part of it; the stream and the land adjoining, while not intended to supply a water power, were intended to secure an uninterrupted and uninterfered with supply of water for manufacturing purposes in the mill. Without the supply of water furnished from the stream and reservoir on the land on the opposite side of the Reading Railroad the paper mill could not be operated. The water and the land on which it was accumulated constituted an indispensable appurtenance of the mill and made the whole one property, and the mere right of way and conveyance could not destroy this identity as one property. Here the land was not disconnected except that a common carrier serving the manufactory ran its cars over the surface and even then plaintiff had a right of way across the railroad. If the taking by defendant had been at one time instead of at different dates in distinct parcels one view could have embraced every item of plaintiff's claim. The court below therefore committed no error in assuming in its instruction to the jury that the property injured by the taking was one property and that injury to the water which supplied the mill on the part west of the Reading Railroad was a proper subject for consideration in assessing consequential damages to the mill property east of the road."⁹

Plaintiff's statement set forth the ownership of an entire property extending on both sides of Forbes street, consisting of a two story frame house and outbuildings erected thereon. By the testimony it appeared that the whole tract contained about four and one-half acres, of which about two and a half

⁹ *Rudolph v. Pennsylvania Schuylkill Valley R. R. Co.*, 186 Pa. 541 (1898); 14 Montg. 150 (1898.)

acres were on the left side of Forbes street without any buildings and about two acres with the buildings were on the right side of the street. The defendant's railroad was located through the two and a half acre part of the tract at a distance of about one hundred and sixty feet from Forbes street. The statement claimed damages to the entire property, but at the trial plaintiff alleged that there was no injury done to the land on the right side of the street. A verdict for \$4,710 was rendered which represented the whole amount of damages sustained by the plaintiff by reason of the location and construction of the railroad on the property as an entirety. It was held not to be error to admit evidence that the injury to the property was confined to the portion of the property through which the railroad was laid, Green, J., saying: "Beyond all question no further claim for this cause can ever again be established for any part of this property. The claim for which the verdict was given is a unit and it covers the whole of the property. It was perfectly manifest that the location and construction of the road could not and did not affect the part of the property on the right side of Forbes street and this was so testified by the plaintiffs and their witnesses, and no attempt was made to prove any damage to that part of the property. In these circumstances we cannot see any objection to the admission of the testimony to prove what was the actual state of the facts, to-wit: That the injury was confined to the part of the property through which the road was laid. If all the injury was confined to one part and there was no injury to the other part, it follows that the injury to the part that was affected was the injury to the whole." ¹⁰

A railroad was located over one of two adjoining lots which were separated by a stream with such high and steep banks as to permit no passage, except by a bridge. No bridge, however, had been built. It did not appear that the two lots had ever been used as a single tract, but there was testimony that the smaller tract on which the railroad was not located had been purchased for the purpose of affording access by means of a bridge to the other tract. It was held that the jury could not

be instructed as a matter of law that they could consider the two lots as a whole in assessing the damages.¹¹

The mere fact that a canal divides a farm into two separate and distinct tracts does not operate to prevent the admission of evidence to show the depreciation of the value of the farm as a whole, although it appears that the railroad was wholly on one of the portions of the farm into which it was divided by the canal, and that the deed to the owner described separately the parts lying on either side of the canal.¹²

Tenants.

37. Where a lease provides that if the property shall be taken by a railroad company that nothing in the lease should "prevent the lessees from recovering damages for such taking," sub-lessees who had no knowledge of the contents of the lease may recover the value of their leasehold from the railroad company which condemned the property.¹³

Taking of Right of Way.

38. Where the owners of adjoining lands have so construed a deed that the owner of one of the tracts has for seventy years used a lane over the land of the second owner, the owner of the first tract may recover damages from a railroad company for removing an overhead bridge which the company had erected fifty years before to span a cut in the lane made necessary in the construction of the railroad. In such a case the private way was appurtenant to the first owner of the land, and when the railroad company took possession of it by removing the bridge it was responsible to him for the damages which he sustained, the measure of damages being the difference between the market value of the land before and after the taking of the lane.¹⁴

Where a landowner conveys real estate to a railroad com-

¹¹ *Kossler v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 208 Pa. 50 (1904.)

¹² *Cameron v. Pittsburgh & Lake Erie R. R.*, 157 Pa. 617 (1893.)

¹³ *Boteler v. Philadelphia & Reading Terminal Railway*, 164 Pa. 397 (1894.)

¹⁴ *Neff v. Pennsylvania R. R.*, 202 Pa. 371 (1902.)

pany for full value, reserving in his deed a ferry landing and a private right of way over and across the land conveyed, the work of constructing the crossing to be done by the railway company, the company may subsequently condemn both the ferry landing and the right of way.¹⁵

In condemnation proceedings the jury has no right to allow damages for distinct items whether estimated by experts or other witnesses, and reach the amount of their verdict in that way. Thus it is error to so instruct a jury as to lead it to think that it may separately assess the value of a right of way.¹⁶

Where a railroad company took the whole of an alleyway, the property owner may recover the difference in value of his property before and after the taking, but there can be no recovery for injury to the property caused by the smoke, noise, ashes and vibration from the railroad.¹⁷

City Lots.

39. Where a railroad is located diagonally across town lots and one hundred and ten feet from the owner's dwelling, the owner is entitled to recover not only the value of the land actually taken, but also damages for the depreciation in the value of the remainder of the lot, and the jury may take into consideration all injuries which would probably and actually result from the reasonable and usual operation of the railroad, such as annoyance from smoke, noise, dust and jarring of the house by passing trains. The jury may also take into consideration the construction of a water tank near the house, if it appears that the water tank multiplied trains at that point, and caused a more frequent use of the road-bed on the property.¹⁸

Where a railroad was located through a large piece of ground situate on the public street of a large city, the owner

15 *Kenney v. Pittsburgh, Virginia & Charleston Ry.*, 208 Pa. 30 (1904.)

16 *Struthers v. Phila. & Del. County R. R.*, 174 Pa. 291 (1896); 6 Del. 354 (1896), reversing 4 Dist. 675 (1895), reversing 6 Del. 190 (1895), reversing 11 Montg. 136 (1895); see also *Kossler v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 208 Pa. 50 (1904.)

17 *Philips v. Philadelphia & Reading Terminal R. R.*, 184 Pa. 537 (1898.)

18 *Comstock v. Clearfield & Mahoning Ry.*, 169 Pa. 582 (1895.)

may be permitted in condemnation proceedings to inquire of a witness as to the value of the land considering that it was possible to lay it out in lots. A witness was asked the question, "What would you say was the fair value of the property as it stood immediately before the railroad was constructed; I don't want you to take into consideration the laying out into lots but the possibilities that it could be done and the possibilities of developing the property?" In holding this to be a proper question the court said: "This was not an inquiry as to all the possible uses that could be made of the land nor as to the erection of improvements or the carrying on of business upon it, but merely an inquiry as to the value of the land considering that it was possible to lay it out into lots. It must be borne in mind that the property in question was a rather large sized piece of ground situate on a public street of a large city, this particular part of it without any buildings upon it and manifestly capable of being laid out and sold in lots. We do not understand that an owner may not prove that fact as to property so situated. On the contrary, such an obvious and advantageous use of the land situated as this is would be a fundamental and essential feature in considering what its market value would be. If it were a piece of vacant land lying in the open country as part of a farm with no indications of its being marketable as town lots the objection would be more pertinent and would probably prevail. But land situated and constituted as this was, its possible disposition as city lots was an essential feature of its value and something which the owner had a right to submit to the jury." ¹⁹

Evidence as to how many building lots a tract of land or any part of it could be divided into and what such lots might be sold for in the future is inadmissible. "The jury may take into consideration any purpose for which the land had value at the time of the entry of the railroad company—its quantity, its location with reference to other improvements, its adaptability for particular purposes giving it value, but it would be improper to arrive at the amount of damages by estimating the number of lots into which the whole tract or any part of it might be divided and then estimating what such lots might

in the future be sold for and considering how the location of the road might affect the value of such lots." ²⁰

Where a jury based their verdict upon valuations taken from a map, which was prospective of what might be done with the premises if divided into city lots and which did not represent actual conditions then existing the verdict will be set aside. ²¹

Where land within the limits of a borough is condemned by a railroad company, the owner may show that his land could be improved, that a time for another and more advantageous use had arrived, and that the natural development of the borough had brought the land into the market for building purposes; but he cannot offer in evidence a plan of streets prepared after the location of the road, and not approved until after the railroad was built. The condition of the property before or after the completion of the road which fixes its value, is its actual condition. The fact that streets existed and that their natural extension would reach the land affected, are facts open to observation and proper for the consideration of the jury; but the future action of the borough authorities in the extension of existing streets or in the opening of new ones, is a matter of mere conjecture. ²²

Where land has been laid out by tenants in common showing lots, streets and alleys under an agreement to partition the land themselves, but before the deeds were executed and the plans were recorded, the land is condemned by an incline plane company, the owners are entitled to recover damages for the land actually taken, and also for the appropriations for ways and easements appurtenant to the land. The streets not opened or accepted by the public cannot be treated as actual streets. The plan itself may be used as evidence of the capacity of the land for improvements in a certain way, and the company may be permitted to show an equally advantageous use of the land in a different way. ²³

²⁰ *Reiber v. Butler & Pittsburg R. R.*, 201 Pa. 49 (1901.)

²¹ *South Side Land Co. v. Easton & Northern R. R.*, 6 North. 313 (1898.)

²² *Walker v. South Chester R. R.*, 174 Pa. 288 (1896); 6 Del. 329 (1896), reversing s. c. 6 Del. 290 (1895); 9 York 139 (1895.)

²³ *Phillips v. St. Clair Incline Plane Co.*, 166 Pa. 21 (1895); 26 Pitts. 41 (1895.)

General Appreciation of Property.

40. The general appreciation of property in a neighborhood resulting from the construction of a railroad cannot be considered in adjusting the damages to a special property. The advantages which are to be considered in connection with the disadvantages are such as are special to the property affected, and give it an increased value above the general appreciation of property in the neighborhood. It is consequently error to limit the rule so as to give to the railroad company merely the benefit of the increase in the value of the property taken in excess of the increase in value of any other property affected by the construction of the railroad. The company has a right to have the jury consider the advantage to each property which was special and peculiar to it as compared with the advantage to the property in the neighborhood which was general.²⁴

Depreciation of Property.

41. Where a railroad appropriates the bed of a stream either in whole or in part for its right of way, and by the construction and ordinary operation of the road pollutes the stream, the owner is entitled to damages and the jury in considering the value of the land, may consider the depreciation of the property by the pollution of the stream.²⁵

Injuries to Gas Plant.

42. In estimating the damage done to property by the exercise of the right of eminent domain, the jury will not be permitted to award speculative damages. Thus where a small piece of land belonging to a gas company, but not occupied as part of the gas plant, was taken, it was held to be serious error to charge the jury that "in ascertaining the market value of the property in question, if the jury find that its highest available use at the time of the taking was that of a gas plant, they have the right to consider the future growth of the borough, the increased demand for gas, as far as these considerations

24 *Mahaffey v. Beech Creek Railroad*, 163 Pa. 158 (1894.)

25 *Rudolph v. Pennsylvania Schuylkill Valley Railroad Company*, 186 Pa. 541 (1898); 14 Montg. 150 (1898.)

affect its market value; and if the jury find that by reason of the location of the railroad through the property its availability has been curtailed, lessened or partly destroyed, they have the right to consider these questions so far as they affect the market value of the property as a whole immediately after the taking." ²⁶

Injuries to Stream.

43. Where a railroad company in condemnation proceedings claimed that the owner of the land had already been compensated for the pollution of a stream by another railroad company which had, some years before, located its railroad through the same tract, the evidence showed that the first company used anthracite coal which caused no serious inconvenience, while the defendant consumed bituminous coal, which had a very polluting effect on the water. It was held that the question of fact as to whether the owner had already been compensated was for the jury.²⁷

Culm Piles.

44. Where a railroad company located its right of way across culm piles of the plaintiff he is entitled to recover the market value of the coal in the bank at the breaker at the time the taking occurred less the estimated cost of removing, cleaning, screening and preparing for market, and in estimating the market value the advantages of getting a present lump sum instead of instalments from time to time by sales of the coal, and also the just allowance to be made for wear and tear of machinery, interest on capital invested, etc., are proper subjects for consideration.²⁸

In statutory proceedings against a railroad company to recover damages for culm taken by a railroad for its own pur-

²⁶ *Spring City Gas Light Company v. Pennsylvania Schuylkill Valley Railroad*, 167 Pa. 6 (1895); 11 Montg. 53 (1895), reversing 10 Montg. 69 (1894.)

²⁷ *Rudolph v. Pennsylvania Schuylkill Valley Railroad Company*, 186 Pa. 541 (1898); 14 Montg. 150 (1898.)

²⁸ *Lehigh Coal Company v. Wilkes-Barre & Eastern R. R.*, 187 Pa. 145 (1898); 9 Kulp 235 (1898), reversing 8 Kulp 540 (1897.)

poses evidence that culm from dumps or piles in the same neighborhood was given away for the filling of streets, railroads, etc., is admissible to show that the substance in plaintiff's dump was of no value. In such a case plaintiff cannot recover without proof of actual loss. If the action had been trespass, he would be entitled to recover nominal damages without proof of actual loss.²⁹

Risks from Fire.

45. Evidence of the large value of the contents of a wooden warehouse situated within six feet of a railroad and which contained large quantities of manufactured goods, hay and pine boxes for packing is inadmissible to show that the warehouse filled with highly inflammable material was in daily danger of destruction from fire because of the lawful use of locomotives. As to risk from fire incident to the lawful operation of a road, there are two theories upon which the claimant for damages can properly argue, such risk is material evidence in his favor. 1. He can claim the danger is so imminent that no man of common prudence would maintain his building in such proximity to the railroad. In that case he is entitled to the cost of removal of his building and its reconstruction in a safe place. 2. If the danger be not great, either from the fireproof character of the structure or its distance from the railroad, yet if it can still be said there is some risk from fire by reason of the lawful operation of the road he can claim that that fact depreciates the market value of the land entered upon. In the first case it is the loss of the improvement; in the second a disadvantage in the use.³⁰

Turnpike Company.

46. Where a road of a turnpike company has been occupied by the tracks of a street railway company the turnpike company is entitled to recover from the street railway company compensation for the occupation and use of the road, and this

²⁹ *Morris & Essex Mutual Coal Co. v. Delaware, Lackawanna & Western R. R.*, 190 Pa. 448 (1899), affirming 2 Lacka. 195 (1896.)

³⁰ *Hamilton v. Pittsburgh, Bessemer & Lake Erie R. R.*, 190 Pa. 51 (1899.)

compensation includes all injury done to the property which is the immediate and direct consequence of the occupation and use. The damage is not measured by the additional cost of maintenance of the roadway only, but by the depreciation in value of the property as a whole resulting from the occupation and use and caused by the presence of the tracks and cars. If these were such a menace to travel as to cause those who would otherwise have driven on the road to abandon its use in whole or in part they directly affected its earning capacity, diminished its revenue and depreciated its value as a property. The turnpike company may show a decrease in revenue and depreciation in the market value of the stock as evidence of the damage sustained; but it cannot show a loss of tolls occasioned by the fact that people availed themselves of the new facilities of travel by riding in the cars instead of driving on the road; nor can it show a loss of tolls caused by the diversion of travel from the turnpike by reason of the increased danger on a city street with which the turnpike connected, and with which it formed a continuous route for travel.³¹

Injuries to Special Business.

47. In determining damages in condemnation proceedings, the value of personal property cannot be considered unless it has actually been taken for construction purposes. If there had been a taking of such property for other purposes, or a trespass upon it, an action at law will lie.

In proceedings to condemn a building where the owner had carried on a tailoring business, the owner cannot show as an element of damages the difference between the market value of his merchandise and fabrics in the store, and their actual value if removed to some other place and applied to the same or some other use; nor can he show an actual or supposed loss of profits in the business which he carried on upon the premises.³²

The value of a property is not to be measured by any particu-

³¹ Allentown & Coopersburg Turnpike Co. v. Lehigh Valley Traction Co., 174 Pa. 273 (1896.)

³² Becker v. Philadelphia & Reading Terminal R. R., 177 Pa. 252 (1896.)

lar use. Thus it is not error for the court to explain to the jury that the question is not as to the value of the property in the market solely as a bottling plant, but also whether its market value for any purpose has been depreciated by the construction of the railroad.³³

Where a lease limits the use of a property to a particular purpose, and the leasehold is subsequently taken by a railroad company, the value of the property for other uses than that specified in the lease cannot be taken into consideration in ascertaining the damages.³⁴

Where the water power of a mill was injured by the construction of a railroad, the court properly admitted evidence of the location and dimension of an old race and a new one substituted in its place, and of the knowledge and acquiescence of the owner of the construction by the company of a new one outside of the right of way in place of a portion of the old one. Evidence may also be admitted as to the leakage in the old dam, and the cost of repairing it.³⁵

Profits of Business.

48. Evidence as to the expected increased profits based upon an estimated saving by reason of the construction of additional buildings upon the land is inadmissible. The value of the property as testified to by one of the plaintiffs was \$75,000 and by reason of the entry of the railroad company it had depreciated \$30,000; that they had contemplated putting additional buildings upon the part cut off by the railroad at an expense of \$10,000, and that by reason of such improvements they estimated a saving of \$1,300 per month in the cost of their product. In the \$30,000 plaintiffs took into consideration the future profits that they expected to make by reason of the increase of the plant. It was held that evidence of the expected increased profits from a future saving by enlargement of

33 *Hamilton v. Pittsburgh, Bessemer & Lake Erie R. R.*, 190 Pa. 51 (1899.)

34 *Boteler v. Philadelphia & Reading Terminal Railway*, 164 Pa. 397 (1894.)

35 *Hoffman v. Bloomsburg & Sullivan R. R.*, 157 Pa. 174 (1893.)

the plant was utterly unreliable, speculative and uncertain and should be excluded.³⁶

While the value of a salt water well upon the premises condemned may be considered by the jury, the market value of the well is not to be determined by evidence of the profits which might be made by treating the product of the well in a manufacturing plant operated with successful business skill. The market value of the well is merely its selling value as such.³⁷

Evidence Admissible.

49. Where land belonging to a gas company is taken by a railroad company, the amount of the capital stock of the gas company, as well as its earnings, are some evidence upon the subject of actual value, and are competent for the jury.³⁸

The declarations of the owner of land as to its value, his offer of it at a fixed price, and a sale of a portion of it are proper evidence on the question of value.³⁹

Where a railroad company has paid all damages occasioned by the construction or use of a bridge and railroad so far as the same ran over certain lands, it cannot subsequently be compelled to pay damages for filling up the land under the bridge, and between the piers and within the width of the lawful right of way of railroads.⁴⁰

Where the statement in an action to recover damages for interference with a right of way avers the establishing of the road and the adverse user of it for the prescriptive period, it is not error to admit in evidence a deed showing a reservation in the plaintiff's predecessor in title of the right of way.⁴¹

³⁶ *Hamilton v. Pittsburgh, Bessemer & Lake Erie R. R.*, 190 Pa. 51 (1899.)

³⁷ *Kossler v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 208 Pa. 50 (1904.)

³⁸ *Spring City Gas Light Company v. Pennsylvania Schuylkill Valley Railroad*, 167 Pa. 6 (1895); 11 Montg. 53 (1895), reversing 10 Montg. 69 (1894.)

³⁹ *Houston v. Western Washington R. R.*, 204 Pa. 321 (1903.)

⁴⁰ *Hummel v. Cumberland Valley R. R.*, 175 Pa. 537 (1896.)

⁴¹ *Neff v. Pennsylvania R. R.*, 202 Pa. 371 (1902.)

Evidence Inadmissible.

50. Evidence of sales of other properties alleged to be situated similarly to the one condemned, is not evidence of market value, as such evidence would introduce collateral issues.⁴²

In condemnation proceedings the jury cannot be permitted to take into consideration as an element of damages the destruction of a river landing on neighboring property.⁴³

Evidence by a third party of the value which a former owner placed upon the land is irrelevant if it is not offered to contradict previous testimony. The best evidence of the former owner's estimate of its value is his own testimony.⁴⁴

Interest.

51. Interest as such cannot be allowed, but a reasonable "compensation for delay" or "detention in payment" may be added to the damages.⁴⁵

Costs.

52. Under the Act of April 25, 1850, a foreign corporation is entitled to appeal from the award of arbitrators by giving bail for costs only.⁴⁶

Qualification of Witnesses.

53. Witnesses will not be permitted to testify as to the value of land taken in condemnation proceedings until the court is satisfied that the witness has the proper knowledge upon which to base an opinion.⁴⁷

A witness in order to be qualified to testify as to land values should be familiar with the property in question, its area, and the uses to which it may be applied, the extent and condition of

42 *Becker v. Philadelphia & Reading Terminal R. R.*, 177 Pa. 252 (1896.)

43 *Mahaffey v. Beech Creek Railroad*, 163 Pa. 158 (1894.)

44 *O'Brien v. Schenley Park & Highlands Ry. Co.*, 194 Pa. 336 (1899.)

45 *Hewitt v. Pittsburgh, Shawmut & Northern R. R.*, 19 Super. Ct. 304 (1902); *Becker v. Philadelphia & Reading Terminal R. R.*, 177 Pa. 252 (1896); *Klages v. Phila. & Reading Terminal Co.*, 160 Pa. 386 (1894); *Lemke's Case*, 23 Pa. C. C. R. 93 (1898.)

46 *O'Connell v. New York, Lake Erie & Western R. R.*, 17 Pa. C. C. R. 125 (1895.)

47 *Schwenk v. R. R. Co.*, 9 York 181 (1896.)

its improvements, and in addition must have a knowledge of the general selling price of land in the neighborhood. In fixing the general selling price such price is not to be shown by evidence of particular sales, of alleged similar lots, but is to be fixed in the mind of the witness from a knowledge of the price at which lots are generally held for sale, and at which they are sometimes actually sold, in the course of ordinary business in the neighborhood. Testimony for this purpose should not be accepted, against objection, upon the mere assertions of a witness that he knows the values. His averment should be tested by having him designate the properties in the vicinity with which he is acquainted and set forth the source of his knowledge of their values; he should be able to give a satisfactory reason for his opinion and show that it rests upon a substantial foundation and is not a mere guess.⁴⁸

Witnesses who had lived in the neighborhood where the land is situated and have known it for many years, who are familiar with the character and quality of the land, the improvements thereon, the manner in which the railroad passed through it and who testified that they knew the value of the land in the neighborhood, are competent, although they testify that they knew of but few sales, where it appears that there had been but few sales, and that whenever a sale of property occurred in the neighborhood it was the principal topic of conversation.⁴⁹

A witness is not qualified as an expert where it is not shown that he has the facts peculiarly within his knowledge.⁵⁰

Where a lease limits the use of the property to lodge rooms, witnesses who testify that they have been for several years connected with the business of renting out lodge rooms and know what localities are most desirable in which to establish

⁴⁸ *Friday v. Pennsylvania R. R.*, 204 Pa. 405 (1903); *Smith v. Pennsylvania R. R.*, 205 Pa. 645 (1903.)

⁴⁹ *Smith v. Pennsylvania R. R.*, 205 Pa. 645 (1903.)

⁵⁰ *Osborne v. Delaware County & Philadelphia Elec. Ry.*, 9 Super. Ct. 632 (1899); 7 Del. 375 (1899); *Shimer v. Eastern Ry. Co.*, 205 Pa. 648 (1903.)

halls to rent to lodgers are competent to testify as to the value of the leasehold.⁵¹

Where a witness has testified as to value and in addition stated that he would give that amount for the property, it is error for the court to charge the jury in such a manner as to leave the impression upon their minds that the estimate of the witness was entitled to great weight by reason of his apparent willingness to back it up by taking the property himself at the figure named. Potter, J., said: "Any such impression would be wrong, and its influence would be misleading because the subject of inquiry before the jury was the market value of the property and not what a particular witness having in view a special purpose might be willing to give for it, if he had the money."⁵²

What Witnesses Are Competent.

54. A witness is competent to express an opinion as to the value of a property who has obtained a knowledge of the property by making inquiries concerning values in that neighborhood.⁵³

A witness who obtains a knowledge of property in the neighborhood as a county commissioner by hearing returns of assessments and putting values on property is competent.⁵⁴

Witnesses who have lived in the immediate neighborhood for a number of years and who were owners of land and well acquainted with plaintiff's farm immediately before and after the construction of the railroad and knew the location of the land, its uses and products as well as the general selling price of lands in the neighborhood are competent.⁵⁵

What Witnesses Are Incompetent.

55. In condemnation proceedings against the property of a

⁵¹ *Boteler v. Philadelphia & Reading Terminal Railway*, 164 Pa. 397 (1894.)

⁵² *Friday v. Pennsylvania R. R.*, 204 Pa. 405 (1903.)

⁵³ *O'Brien v. Schenley Park & Highlands Ry.*, 194 Pa. 336 (1899.)

⁵⁴ *O'Brien v. Schenley Park & Highlands Ry.*, 194 Pa. 336 (1899.)

⁵⁵ *Hewitt v. Pittsburgh, Shawmut & Northern R. R.*, 19 Super. Ct. 304 (1902.)

gas company an expert whose knowledge relates to machinery for producing gas, and who had no knowledge of land values in the vicinity, is not a competent witness if it appears that the property taken was a small corner of the gas company's land which was not in any way used as part of its gas plant.⁵⁶

A witness called as an expert who testifies that he had no special knowledge of the property until after the completion of the railroad, that he then went and examined it, and made inquiry as to sales in the neighborhood, and that what he found out about the sales was ascertained within two or three weeks of the trial, is not competent to testify as an expert.⁵⁷

Cross Examination.

56. Where a witness offered as an expert has testified to his qualifications, an opportunity should be given the opposing side to cross-examine him before he is allowed to express an opinion as to values.⁵⁸

Where plaintiff's witnesses testify on cross-examination that a particular portion of the property was damaged in a particular way, defendant may offer evidence as to the effect on such particular portion of the land, of the construction of the railroad.⁵⁹

⁵⁶ *Spring City Gas Light Company v. Pennsylvania Schuylkill Valley Railroad*, 167 Pa. 6 (1895); 11 Montg. 53 (1895), reversing 10 Montg. 69 (1894.)

⁵⁷ *Struthers v. Phila. & Del. Co. R. R.*, 174 Pa. 291 (1896); 6 Del. 354 (1896); reverses 4 Dist. 675 (1895); 6 Del. 190 (1895); 11 Montg. 136 (1895.)

⁵⁸ *Friday v. Pennsylvania R. R.*, 204 Pa. 405 (1903.)

⁵⁹ *Moser v. South-West P. R. R.*, 28 Pa. C. C. R. 73 (1902.)

CHAPTER VII.

LOCATION OF RAILROADS.

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| 57. Power to Locate. | 61. Branches. |
| 58. Boundaries of Right of Way. | 62. Sidings, Switches and Additional Tracks. |
| 59. Provision for Future Needs. | |
| 60. Gauge. | |

Power to Locate.

57. The location of a railroad under its right of eminent domain in Pennsylvania must be by a corporate act. It cannot be referred to the president of a company, nor to any other official. But if the action of the president of a railroad company who, without authority and without any resolution of the board of directors, authorized the entry upon and appropriation of plaintiff's land for the purposes of its road, is ratified before the plaintiff, an objecting land owner obtains an injunction, the court will upon hearing dissolve the injunction.¹

The successive steps necessary to vest title to the roadway in a railroad are:

1. A preliminary entry on the land of private owners for the purpose of exploration, which is made by engineers and surveyors, who run and mark one or more experimental lines.

2. A selection and adoption of a line or one of the lines so run for the location of the proposed railroad, which is done by the corporation and requires action in some form by the board of directors.

3. Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made when the amount due him is legally ascertained. The title of the owner of the land is not divested until the last of these steps has been taken.²

¹ Delabole Slate Co. v. Bangor & Portland R. R. Co., 6 North. 337 (1899.)

² Rocky Glen Water Co. v. Scranton & Northeastern R. R. Co., 7 Lacka. 237 (1901.)

If a company has an option between two or more lines or routes it must make its election by an actual adoption of one of them before it can acquire title by appropriation upon either, and after a selection has once been made by a company its engineers have not the authority to make "slight" or "immaterial" changes in their own discretion.³

Where a railroad company through its board of directors has adopted a line according to a survey made by its engineers, and the line thus adopted has been marked by stakes, failure to maintain the stakes and keep them in position will not estop the company from asserting its right to the location against another company subsequently locating a railroad over the same route.⁴

Where a railroad company has legally located and adopted its line of railroad and established the grade thereof, and has proceeded within two years from the date of its incorporation to construct its road, it has during the five years from its incorporation a vested interest in its whole right of way, although a portion may not have been reached in the laying of its tracks, and accordingly if another railroad company subsequently incorporated lays its tracks upon such unoccupied right of way the former company may remove the tracks thus laid.⁵

Boundaries of Right of Way.

58. A railroad company which has lawfully entered upon land for its right of way can define the extent of a lawful appropriation by marks on the ground, by maps of surveys filed of record, or by actual occupation for twenty-one years.⁶

Where there are no monuments to indicate the extent of the original taking for a railroad's right of way and no survey

3 Rocky Glen Water Co. v. Scranton & Northeastern R. R. Co., 7 Lacka. 237 (1901.)

4 Pittsburgh, Virginia & Charleston R. R. Co., v. Pittsburgh, Canonsburg & State Line R. R., 159 Pa. 331 (1893.)

5 Kushequa R. R. v. Pittsburg, Shawmut & Northern R. R., 200 Pa. 526 (1901.)

6 Zahn v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 184 Pa. 66 (1898); 28 Pitts. 248 (1898.)

on record or elsewhere serves to define the boundaries, the boundaries of the railroad's right of way must be determined by the extent of the actual occupancy. A railroad company which has lawfully entered upon land for its right of way and has made compensation to the owner therefor and for twenty-one years has had an actual and exclusive occupancy of a strip sixty feet wide the boundary of the easement is settled by such occupancy, and the land owner can recover no portion of such strip even although the railroad company originally appropriated and paid for a less quantity of land.⁷

In an action of ejectment by a land owner against a railroad company, the railroad company claimed a right of way sixty feet wide. The land owner claiming that a less amount had been appropriated introduced in evidence a map which was made by one of the viewers and filed of record when the railroad located its right of way through plaintiff's farm. The map failed to show a single course or distance or the width of the land for which damages were awarded, but simply showed the general course or route of the road through the farm. It was held that the map was too indefinite to establish the boundaries of the right of way.⁸

A railroad company authorized by its charter to take for its right of way a strip of land not exceeding sixty-six feet in width may limit the width of its appropriation to less than sixty-six feet; but unless such limitation affirmatively appear, it will be presumed that it has appropriated the full width allowed by its charter.⁹

In an action to recover damages for an alleged trespass, where the question involved is, title to a strip of land upon which a railroad company has laid a fourth track, if the plaintiff shows that he and his predecessors have had continuous and adverse possession of the strip for over forty years, the burden of proof is upon the defendant to show that the strip in controversy was embraced within the limits of the right of way

7 Zahn v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 184 Pa. 66 (1898); 28 Pitts. 248 (1898.)

8 Zahn v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 184 Pa. 66 (1898); 28 Pitts. 248 (1898.)

9 Wilkinson v. Philadelphia & Reading Ry., 13 Montg. 93 (1897.)

acquired by condemnation proceedings, and if the evidence as to the location of the right of way and as to whether the land in controversy was included in it is conflicting the case is for the jury. In such a case an agreement in writing by which one of plaintiff's predecessors in title was given a right of passage over the land is competent evidence, as is also a plan showing the appropriation by the company and the present location of the tracks made by an engineer, who was a witness, from his notes of survey.¹⁰

A railroad company, having the right of eminent domain, which acquires land, not in the exercise of such right, but as a purchaser for railroad purposes, from one holding adverse possession, acquires a good title to the land so taken when the combined adverse possession of its vendor and itself exceeds twenty-one years.¹¹

Where a railroad company was granted by deed for the consideration of \$700 the easement and right of way for the construction, maintenance and use of a road of two or more tracks, with appurtenances forty feet in width, at the grade of the road-bed of the railroad, with all such additional widths as should be necessary for the slopes of the cuts, fills, ditches and appurtenances, and the deed also contained the following covenant: "And it is also agreed that the said railroad company shall not by its fill or embankment obstruct the flow of water in Speer's Run nor in any way interfere with the roadway leading to said sawmill tract now in use adjoining Speer's Run," such a covenant under the Act of March 17, 1869, P. L. 12, will not bind the railroad from exercising its right of eminent domain in such a way as to lower said roadway about seventeen inches. "The right of a railroad company to make the necessary improvements contemplated by the Act of 1869 was intended in large measure to be exercised for the public good and it will not be presumed in the absence of clear words that the company intended to barter away that right and thus

10 *Bassett v. Pennsylvania R. R.*, 201 Pa. 226 (1902.)

11 *Covert v. Pittsburg & Western Ry. Co.*, 204 Pa. 341 (1903), reversing s. c. 18 Super. Ct. 541 (1900.)

disable itself wholly or in part to perform those public functions it has undertaken." ¹²

The property rights of a railroad company in its right of way do not extend upwards beyond a line necessary to transport its passengers and employees with safety and dispatch, nor downwards beyond a line of support for its tracks and superstructures; the line of demarcation has not been and probably cannot be defined in fee. ¹³

Provisions for Future Needs.

59. Where the directors of a railroad company locate the right of way to an exceptional width, they are bound to show the existence of the circumstances under which the charter of the company authorized such location. Thus under the Act of April 14, 1836, P. L. 319, the Pennsylvania Railroad Company was limited in its right to take land to a strip sixty-six feet wide, "except in the neighborhood of deep cuttings, or high embankments, or places selected for sidings, turnouts, depots, engine or water stations." The company condemned a strip one hundred and forty feet wide for the length of over four thousand feet through a farm. The engineer of the company testified that there was a cut on the farm of thirteen feet, and an embankment of the same height, and that by the ordinary rule of engineering forty-nine additional feet would be required. The length of the cut did not appear nor was it shown that there had been any location of sidings, turnouts, depots, engine or water stations. The engineer merely testified that the additional width was taken for the future uses of the road. It was held that the company had no right to take more than sixty-six feet. ¹⁴

A railroad company is not required in the first instance to condemn land to the full width of sixty-six feet; it has the right to acquire additional land within the limited width as necessity arises. The widening power given to a railroad com-

¹² *Jones v. Pittsburg, McKeesport & Youghiogheny R. R.*, 11 Super. Ct. 202 (1899.)

¹³ *Cumberland Valley, etc., R. R. Co. v. Chambersburg & Gettysburg Elec. Ry. Co.*, 6 Dauph. 196 (1903.)

¹⁴ *Robinson v. Pennsylvania R. R.*, 161 Pa. 561 (1894.)

pany under the Act of March 17, 1869, is not exhausted at a given point along the line of the road-bed by a single taking of land; the widening at that point may be repeated whenever the safety of persons and property and the facilities for transportation of traffic require such action.¹⁵

Plaintiff, the owner of a farm, filed a bill in equity to restrain a railroad company from appropriating land in addition to its sixty-six feet of roadway for the purpose of changing the channel of a creek and thus avoid the expense of constructing two bridges. The evidence showed that it was practicable to build the road without the change, but was more expensive. It was held that the railroad Acts of Pennsylvania did not authorize an appropriation of land for that purpose. Frazer, P. J., said: "Counsel for defendant argue that such authority is to be found in that portion of the Act of 1849 which authorizes railroad companies 'to survey, ascertain, locate and fix, and mark and determine such route for a railroad as they may deem expedient,' and also to construct 'such bridges, viaducts, turnouts, sidings, or other devices as they may deem necessary and useful.' We cannot agree with this contention. Under the law railroad companies have the right to take land for their right of way to the extent of sixty-six feet in width together with whatever additional may be necessary for slopes and fills. If any greater width is desired the right to take the same must be shown to exist under the law. Certainly the authority to take additional land for 'viaducts, turnouts, sidings or other devices they may deem necessary or useful' does not confer the power to take land for the purpose of changing the channel of a stream simply because the changing of the same would make the construction of the road less expensive. While a railroad company in the construction of its road has not generally the right to divert the natural flow of the waters of a stream, yet there may be cases when that may be done. If a company should find it impracticable to carry out the purposes of its incorporation without changing the channel of a stream in constructing its road, perhaps upon these circum-

¹⁵ *Sutton v. Pennsylvania R. R. Co.*, 19 Montg. 111 (1903); 9 North. 44 (1903.)

stances being made to appear private interest would be required to yield to the necessities of the public. We, however, have no such case before us. In this case the difference in cost between bridges and an embankment is not sufficient to make the use of the former impracticable and as to the danger incurred it is sufficient to say that the reasonable degree of safety required by the public has been secured by other companies using bridges in the construction of their railroads and we see no reason why the same cannot be done by defendant." ¹⁶

Gauge.

60. A railroad company was incorporated under the Act of March 18, 1875, for the purpose of constructing a narrow gauge railroad. It subsequently granted to another railroad company the right to cross its tracks. Some years later the lessee of the narrow gauge railroad sought to widen its tracks from three feet to four feet eight and one-half inches. The company to whom the right of crossing had been given resisted the attempt to widen the gauge. The court held that a railroad company organized under the narrow gauge Act of March 18, 1875, which limits the gauge of railroads under the Act to three feet has no power to increase the width of its gauge, although no injury will result to the public. The Act of March 18, 1875, repeals so much of the Act of April 11, 1853, as relates to railroads whose gauge is three feet or less. And the Act of March 17, 1869, giving a railroad company organized under the Act of 1875 power to straighten or widen its lines refers to the right of way and not to the track.¹⁷

Branches.

61. Where directors have located a branch railroad in good faith, the court cannot review their discretion.¹⁸

¹⁶ *Snee v. West Side Belt R. R.*, 34 Pitts. 73 (1903.)

¹⁷ *Western New York & Pennsylvania Ry. Co. v. Buffalo, Rochester & Pittsburg Ry. Co.*, 193 Pa. 127 (1899.)

¹⁸ *Price v. Penna. R. R.*, 209 Pa. 81 (1904.) In this case the lower court undertook to review the discretion of the directors in locating a branch

The discretion in determining whether branch railroads under the Act of April 4, 1868, shall be built, and where they shall be built and where they shall be constructed is vested in the board of directors and where the power exists their judgment is not subject to the equitable supervision of the courts either at the instance of individual complainants or at the suggestion of the Attorney General unless there is a wilful abuse of the power. But the existence of the franchise claimed is subject to review under the Act of June 19, 1871.¹⁹

Under the Act of April 4, 1868, a company may construct a branch to connect with another railroad although it may run substantially parallel with another part of its own road leased to another company.²⁰

A railroad company will not be restrained from building a branch on its own property to connect its main line with a wharf and canal, although it will cross at grade the location of another railroad, if it appears that the branch was authorized and practicable, and formed no insuperable obstruction to the other railroad.²¹

Where a public railroad for the purpose of increasing its railroad. On appeal the decree was reversed, Chief Justice Mitchell saying:

By the opinion it appears that the court differed with the board of directors as to the promotion of the convenience of the inhabitants of the county by the proposed branch road, that it held that the burden of proof was on the defendant to show such convenience, and that no sufficient proof to that effect had been presented.

This view unfortunately overlooks the fact that the decision as to the convenience, etc., is vested by the statute in the board of directors, and not in the court. A difference of opinion or judgment on the facts in this regard is altogether immaterial. The decision of the board is not reviewable by the court, except so far as to see that it is in good faith an exercise of the branching power conferred by the charter. Unless it is clearly *ultra vires* in that respect, the court has no authority to interfere. The language of the statute is too plain to admit of any other construction, "to make such lateral railroads or branches . . . as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof, and the interests of said company."

¹⁹ Delabole Slate Co. v. Bangor & Portland R. R., 6 North, 337 (1899.)

²⁰ Com. ex rel. v. Erie & Wyoming Valley R. R., 3 Dauph. 189 (1900.)

²¹ Pennsylvania Schuylkill Valley R. R. v. Philadelphia & Reading R. R., 160 Pa. 232 (1894.)

business and accommodating the trade and public travel of the public connects a private mining operation by means of a branch line the court will not restrain the building of such a branch line as the connecting of such a road is a public and not a private enterprise.²²

A railroad company under the power given by the Act of April 4, 1868, may build a branch road from a point upon a branch of the main line already constructed.²³

A railroad company is not required to build the whole of its main line before constructing branch lines.²⁴

A delay of five years and two months in building a branch railroad after its location is not evidence of abandonment by mere lapse of time.²⁵

Where an Act authorizes a railroad company to build a railroad "with power to construct such branches as the directors may deem necessary, and to connect all or either of them with any railroad or railroads now constructed, or that may hereafter be constructed" and provides that the railroad should be completed within five years, the power to build branches is a continuing power, and the time fixed for the completion of the railroad has no relation to the building of the branches.²⁶

Where the directors of a railroad company acted in bad faith in locating a branch, the remedy against the railroad company is by action upon the part of the Commonwealth, and not by a suit in equity by a landowner whose property was taken.

A railroad company organized under the Act of April 4, 1868, located and constructed a branch from its main line to a large manufacturing plant in a village. The village was served by another railroad. In the resolution of the directors locating the branch, it was stated that the branch was "necessary

²² *Rochester & Pittsburg Coal & Iron Co. v. Berwind-White Coal Mining Co.*, 24 Pa. C. C. R. 104 (1900.)

²³ *Delabole Slate Co. v. Bangor & Portland R. R.*, 6 North. 337 (1899.)

²⁴ *Robbins v. Western Washington R. R.*, 31 Pitts. 181 (1900.)

²⁵ *Pittsburgh, Virginia & Charleston R. R. Co. v. Pittsburgh, Canonsburg & State Line R. R.*, 159 Pa. 331 (1893.)

²⁶ *Pittsburgh, Virginia & Charleston R. R. Co. v. Pittsburgh, Canonsburg & State Line R. R.*, 159 Pa. 331 (1893.)

to increase the business of the company and accommodate the trade and travel of the public." When the branch was finished the only use to which it was put was to transport goods from the manufacturing plant. No station was erected nor was any passenger coach run on it. It was held that a land owner whose property had been condemned had no standing in equity for an injunction to restrain the railroad company from using the land.²⁷

Appurtenances do not mean branches. Thus where an Act gave five years additional time for the completion of the railroad "with one or more tracks, sidings, depots and appurtenances," it was held that the word "appurtenances" did not include branches, and that the limitation of the Act did not apply to the construction of branches.²⁸

A railroad company, engaged in a heavy transportation business, which locates a branch line on land for a part of which it has a deed, and for the remainder, title by condemnation proceedings, and is in actual or constructive possession of the land for railroad purposes, may maintain a bill in equity against a railroad company subsequently chartered, which seeks by force to oust the first company from the land.²⁹

Sidings, Switches and Additional Tracks.

62. An injunction will not be granted to restrain a railroad company from using a switch in a street where the evidence shows that the switch is only used for the purpose of moving cars to and from the company's yard and of receiving and delivering freight to points not usually reachable by the main line and that this use "did not exceed on the average once a month."³⁰

²⁷ *Rudolph v. Pennsylvania Schuylkill Valley R. R. Co.*, 166 Pa. 430 (1895); 11 Montg. 41 (1895); *Delabole Slate Co. v. Bangor & Portland R. R.*, 6 North. 337 (1899); *Windsor Glass Co. v. Carnegie Co.*, 204 Pa. 459 (1903); *Snyder v. Baltimore & Ohio R. R.*, 33 Pitts. 323 (1903.)

²⁸ *Pittsburgh, Virginia & Charleston R. R. Co. v. Pittsburgh, Canonsburg & State Line R. R.*, 159 Pa. 331 (1893.)

²⁹ *Pennsylvania Company v. Ohio River Junction R. R.*, 204 Pa. 356 (1903.)

³⁰ *Lake Shore & Michigan Southern Ry. Co. v. Wiley*, 193 Pa. 496 (1899.)

A railroad company will not be restrained from removing a siding leading from the railroad to plaintiff's warehouse which it is necessary to remove to enable an additional track to be constructed necessary for the operation of the road, where it appeared that no agreement existed between the parties relative to the siding and that another siding extended from the railroad to the property.³¹

Where a person is indicted for nuisance for maintaining a railroad track as a siding on a public highway, he may show that although the siding ran into his mill the railroad company from whose line it extended constructed, maintained, and repaired it.³²

Section 32 of the Act of April 2, 1831, providing that a certain railroad should not prevent the owners of land bordering on the railroad from constructing lateral railroads to connect with the railroad, etc., does not authorize an individual to lay railroad tracks for a siding on a public highway.³³

A railroad company will not be restrained from using a certain derailing switch adjoining a township road and from making further crossings over the public road and be compelled to furnish lamps and electricity for lighting a passage under an overhead crossing, where from the evidence it appeared that defendant under its agreement with the township was ready to furnish electricity for lights, but complainant failed to furnish lamps as required by the contracts; that the switch did not belong to defendants, and the other complaints do not amount to such a breach of the contract as to justify interference.³⁴

A railroad company bought a strip of ground in a borough and laid two tracks, after which the borough laid out a plan with streets crossing the railroad and crossings were made and kept up by the railroad. Subsequently the railroad company proceeded to lay additional tracks on its land. It was held that the railroad company had the right to lay the addi-

31 *Wood v. Philadelphia, Wilmington & Baltimore R. R.*, 8 Del. 321 (1901.)

32 *Com. v. Greybill*, 17 Super. Ct. 514 (1901.)

33 *Com. v. Greybill*, 17 Super. Ct. 514 (1901.)

34 *North Versailles Township v. Union R. R.*, 33 Pitts. 410 (1903.)

tional tracks conforming to the grade of the street and would be granted an injunction restraining the borough from interfering with the laying of the tracks.³⁵

Where the owner of land laid out a street upon his land, which was adopted by the borough but never opened, and built a railroad along the line of the street, subsequently transferred the railroad to a corporation without any conveyance in writing, and afterwards conveyed the land on which the railroad was built without any mention of the easement in the deed, the use of the right of way by the railroad at this time being open, notorious and visible to the grantee, it was held in an action by the railroad company against the grantee, that the purchaser of the land took it with only such notice of the easement as the actual use of the right of way, at that time would convey and if the railroad required any additional right of way, it must condemn and pay for the land. In addition it was held that the purchaser had the right to cross and recross the track, as the railroad as originally built was within the line of a public street of the borough.³⁶

35 *Pittsburgh & Connellsville R. R. v. Braddock Borough*, 33 Pitts. 191 (1902.)

36 *Chester & Delaware River R. R. v. Standard Steel Castings Co.*, 6 Del. 233 (1895.)

CHAPTER VIII.

CHANGING SITE OF HIGHWAY.

63. Remedy—Mandamus.

64. Indictment.

65. Negligent Construction.

66. Reconstruction of Turnpike.

Remedy—Mandamus.

63. Mandamus is the appropriate proceeding to compel a railroad company to build an overhead bridge of sufficient width which was built to avoid a grade crossing in place of a bridge insufficient to accommodate the highway travel. Supervisors of the township may apply for the writ, but the application for the writ must be instituted in the county where the railroad company has its office and chief place of business.¹

A writ of alternative mandamus awarded to compel a railroad company to rebuild portions of a public highway lying in three different municipalities which had been taken by it forty-three years before the filing of the writ will be quashed, where the road asked to be reconstructed lies in three different municipalities and only one of the municipalities by its proper officer is asking for its reconstruction.²

Indictment.

64. Where a railroad company has been acquitted on the trial of an indictment charging it with neglect to relocate and reconstruct several different portions of a public road, it cannot subsequently be convicted on an indictment charging it with neglect to relocate and reconstruct the whole of the same highway.³

¹ Com. *ex rel. v. Pennsylvania R. R. Co.*, 4 Dist. 362 (1895); 11 Montg. 52 (1895.)

² Com. *ex rel. v. Allegheny Valley R. R.*, 28 Pitts. 77 (1897); 6 Dist. 565 (1897.)

³ Com. *v. Allegheny Valley Ry. Co.*, 21 Super. Ct. 188 (1902.)

Where a railroad company is indicted for maintaining an alleged illegal crossing over a country road and it appears that the laying of a second track at the point in question somewhat narrowed the traveled part of the road but it was disputed whether to such an extent as to impede travel, the question whether travel is impeded is for the jury. In such a case it is not an improper exercise of the discretion of the court to refuse to permit a map of the locality to be sent out with the jury where such map was not an exact representation of the height of an embankment at the crossing as compared with its length.⁴

Negligent Construction.

65. A railroad company cannot be held responsible in damages for the death of a person caused by the alleged negligent construction of an overhead bridge where it appeared that the railroad company had contracted with the borough to build a bridge in consideration of the borough vacating portions of certain streets which crossed its tracks at grade, and that the accident did not occur until long after the bridge had been completed and accepted by the borough.⁵

Reconstruction of Turnpike.

66. Where a railroad company was authorized to change the site of any turnpike, etc., upon assuming the burden of reconstructing such road longitudinally occupied, a corresponding duty to reconstruct the road falls upon a railroad company which succeeds by purchase to all its franchises and privileges. Rice, P. J., said: "The statutory duty of a railroad company to reconstruct a road taken up by it is a continuing duty; and if not performed by it, it devolves upon the railroad company which succeeds by purchase to its franchises and privileges and mere lapse of time will not absolve it from this duty, nor bar the Commonwealth.

"The offence in this case is not for taking possession of the highway in the construction of its road, but for the disregard

⁴ *Com. v. Philadelphia, Harrisburg & Pittsburg R. R.*, 23 Super. Ct. 235 (1903.)

⁵ *Smith v. Pennsylvania R. R.*, 201 Pa. 131 (1902.)

of its duty to forthwith reconstruct so as to provide a suitable highway in lieu of the one taken. It cannot therefore be compelled in this case to either remove the obstruction from the old road or to construct a new one. The sentence can go no further than to punish for the offence committed. That offence is the neglect to construct within a reasonable time. The performance of that duty cannot be specifically enforced by sentence on this conviction."⁶

6 *Com. v. Allegheny Valley Ry. Co.*, 14 Super. Ct. 336 (1900.)

CHAPTER IX.

TAKING OF DWELLING HOUSE.

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| 67. Where Dwelling House is on
Town Lot. | 68. Widening Road.
69. Rights of Widow. |
|---|--|

Where Dwelling House is on Town Lot.

67. A railroad company appropriated the rear end of a town lot and constructed a railroad thereon upon trestle work at an elevation of thirty-three feet above the ground and within twenty-eight feet of plaintiff's dwelling. None of the out-buildings were destroyed, nor access to and from the property in any way interfered with. It was held that the company would not be enjoined from taking the land.¹

A railroad company will not be restrained from appropriating a strip of ground for railroad purposes on the ground that its railroad shows a passing through the dwelling house of the defendant within the meaning of Sec. 10 of the Act of February 19, 1849, where the evidence shows that the ground to be appropriated is a strip forty feet off the rear end of the defendant's lot, twenty-nine by one hundred and twenty feet, upon which is erected a frame dwelling occupied by the defendant; that the right of way of plaintiff's railroad will come within thirty-five feet of the line of defendant's house; that the railroad is to be constructed upon trestle work at a height of from twenty-five to thirty feet above the level of the surface, in such a manner as not to interfere with ingress to and egress from defendant's dwelling.²

A railroad company will not be enjoined from cutting off a corner of a lot and destroying a barn where it appears that the dwelling house on the lot was at least one hundred and twenty-

¹ *Milroy v. Pittsburg, Bessemer & Lake Erie R. R.*, 29 Pitts. 176 (1897); 11 York 16 (1897); 27 Pitts. 377 (1897.)

² *Pittsburg, Bessemer & Lake Erie R. R. v. Cleland*, 29 Pitts. 160 (1898.)

five feet from the railroad, and that there was ample room on the remainder of the lot for a stable and carriage house.³

The exemption of dwelling houses from condemnation by railroad companies contained in Sec. 10 of the Act of February 19, 1849, is not repealed by implication by Sec. 1 of Art. 17 of the Constitution of 1874.⁴

Widening Road.

68. A railroad incorporated prior to the general railroad law of February 19, 1849, has authority under the Act of March 17, 1869, P. L. 12, in proceedings to widen its road, to condemn land upon which a dwelling house is erected.⁵

Under the Act of March 17, 1869, P. L. 12, providing for the improvement and extension of the facilities of a railroad already built, a railroad company may condemn a house occupied by the owner upon giving the security provided for by the Act, when the purpose of the taking is for the improvement and extension of its road.

The Acts of 1849 and 1869 are not in conflict as they deal with different subjects—the first, the construction of a road, and the second, the improvement and extension of the facilities of an already constructed road. Dean, J., said :

“This restriction, when it comes to the selection of the first route of the railroad, is not necessarily an insuperable obstacle to location; the company is not compelled to locate its road-bed on any particular line; it could in most cases, and especially in that early day, avoid a dwelling house by adopting a more costly line which did not touch it. It may be doubted whether if the exigencies and necessities of the future had been foreseen as they are now known, the Legislature would, fifty years ago, have imposed even such a restriction.

“A restriction of this kind does hamper, and does in many cases obstruct great public improvements: improvements not

3 *Rudolph v. Pennsylvania Schuylkill Valley R. R.*, 166 Pa. 430 (1895); 11 Montg. 41 (1895.)

4 *Weigold v. Pittsburg, Carnegie & Western R. R. Co.*, 208 Pa. 81 (1904.)

5 *Marlor v. Philadelphia, Wilmington & Balt. R. R.*, 166 Pa. 524 (1895); 6 Del. 123 (1895); *Snyder v. Baltimore & Ohio R. R.*, 33 Pitts. 323 (1903.)

projected and constructed for the benefit alone of the corporation, or of any particular locality, but for the advantage of the whole Commonwealth. And when damage is done an individual for the benefit of the public, full compensation is provided for. But whether a restriction imposed more than half a century ago be at this day reasonable or unreasonable, is not the question before us; it is the law of the land and must, in the location and adoption of a route be observed. For twenty years there was no relaxation or modification of this restriction. During that period railroads were empowered to appropriate a width of not exceeding sixty feet for their roadbed; some took more and some less; it has however been held that a clearly defined exercise of the power of appropriation exhausted the power. Whether the taking had been of a strip as wide as authorized or narrower, in a very few years railroad companies discovered that the mere opening and operation of their lines so stimulated and increased business, traffic and travel, that population pressed them on each side of their lines; many kinds of business got as close to the roadbed as possible; even the noise and discomfort to occupants of dwelling houses was not sufficient to deter them in many cases from building and living close to the railroad. In the meantime the business of the railroads had enormously expanded; they wanted more room; in many cases it was impossible for them to perform the duties enjoined upon them by law and which by their charters they were bound to perform without increase of trackage; the public suffered as well as they; they had exhausted their power of location by their original taking; the land on each side had been improved by the erection of dwelling houses and other improvements close up to their roadbed; they could not move their main line, and if they could have done so, they would have been met by practically the same obstacles on a new route. Yet the public demands for transportation facilities had to be met. Such were the facts which in 1869 prompted the passage of that Act. It was a necessity, which necessity has since become more imperative.

“The Act of 1869 reads as follows: ‘That it shall and may be lawful for any railroad companies now or hereafter incorporated, . . . to widen, deepen, enlarge or other-

wise improve the whole or portions of their line of railroad whenever in the opinion of the board of directors of any such company the same may be necessary for the better securing the safety of persons and property, and increasing the facilities and capacity for the transportation of traffic thereon, and for such purpose to purchase, hold and use or enter upon, take and appropriate land and materials.'

"By its express terms this Act conferred upon railroad companies an authority which they did not theretofore have; it restricted no road, whether its original taking was sixty feet, or less, to its first appropriation; it could widen and otherwise improve its line whenever in the opinion of its board of directors such widening was necessary. To give the Act any other meaning, would in view of the facts defeat its main purpose. Any house owner could effectually put a stop to any attempt of the company to provide for the safety of persons and property or to furnish increased facilities for transportation. There is not a word in the Act which manifests an intention to limit the power as in the tenth section of the Act of 1849, nor has it ever been so interpreted by this court." ⁶

Under the Act of March 17, 1869, a railroad company may condemn a dwelling house in the occupancy of the owner upon making compensation to him, although the land is taken for the purpose of widening or improving the whole or any portion of the company's lines whenever it is necessary for increasing the facilities of transportation. In such a case it is immaterial that when a certain number of sidings are placed together and used by the company generally to increase its facilities, and not for the accommodation of individuals, this collection is called a yard. "Such sidings and structures are absolutely essential to the operation of a railroad. Without them the company could not perform its function as a common carrier. The Legislature in passing the Act of 1869 certainly had them in mind." ⁷

Plaintiff sought to restrain the defendant from taking part of the curtilage of his dwelling house in straightening and

6 *Dryden v. Pittsburgh, Virginia & Charleston Ry.*, 208 Pa. 316 (1904.)

7 *Glaser v. Glenwood R. R.*, 33 Pitts. 299 (1903); 208 Pa. 328 (1904); *Snyder v. Baltimore & Ohio R. R.*, 33 Pitts. 323 (1903.)

widening its road. It appeared that the new line of the road took a strip of land two hundred feet in average width, came within eight feet from the porch of his house, passed over a well from which the water supply was obtained (but not however depriving him of the use of it) and impeded the outlet from the front of the house. Part of the ground was taken for the purpose of changing the location of the turnpike, the new tracks occupying its old bed in front of the house. It further appeared that the new railroad had been laid out, the land appropriated and bond filed two years before relief was prayed for. It was held that the bill for an injunction should be dismissed.⁸

Rights of Widow.

69. A widow in possession of a town lot and dwelling house, having a statutory dower interest therein is an owner within the meaning of the Act of 1849 and may maintain a bill to restrain the company from appropriating the property.⁹

⁸ *Peiffer v. Harrisburg, Portsmouth, Mt. Joy & Lancaster R. R.*, 12 *Lanc.* 265 (1895.)

⁹ *Milroy v. Pittsburg, Bessemer & Lake Erie R. R.*, 29 *Pitts.* 176 (1897.)

CHAPTER X.

USE OF STREETS AND ROADS.

70. Municipal Consent.

72. Obstruction of Streets.

71. Municipal Control — Watchmen, etc.

Municipal Consent.

70. A railroad company incorporated under the general railroad Act of 1868, and its supplements, has no power to enter upon, occupy and cross the streets of a municipality without its consent. The express prohibition of Sec. 12 of the Act of 1868 which prevents "the occupation of a street without municipal consent" is in no sense repealed by Sec. 1, Art. 17 of the Constitution of 1874, which provides that "any corporation organized for the purpose shall have the right to construct and operate a railroad between any points within the State and to connect at the State line with railroads of other States." Dean, J., said: "The Constitution is to be interpreted with reference to previous legislation of the State and powers always previously exercised by the Legislature remain to them, unless expressly or impliedly prohibited. While one object of the Constitution probably was to encourage competition between carrying corporations it just as plainly sought to promote another object, that is by the prohibition of all local legislation to encourage self-government by the people under general laws providing for local control of their local affairs. It would require a very plain mandate of the Constitution to move us to interpret the section in question as one practically handing over to railroad corporations the authority to control, occupy and obstruct the streets and highways of a great city in disregard of the convenience of citizens. While the interests of the carrying corporation and the municipality are not in themselves antagonistic they may easily become so by selfishness and indifference to each other's rights. It is to the interest of

the citizen that his city should grow and expand; with its growth commercially and industrially the railroad thrives. This, however, is only sound theory; in practice the railroad without regard to the city very often assumes that its only interest is to make money for the stockholders. It is therefore of the utmost importance to the well being of the city, that it should control its means of local business and social communication. In no reasonable interpretation of Sec. 1, Art. 17 of the Constitution, having regard to the legislation then existing and other parts of the same instrument can we see that it intended with the Act of 1868 plainly before the convention to take away from the municipal government the control of its streets and highways."¹

A railroad may be constructed and operated on the streets of the City of Philadelphia by a corporation organized under the general railroad law of April 8, 1868, P. L. 65, if the consent of the city be given thereto.²

A city cannot confer the right to construct a railroad on a street upon corporations or individuals who have no authority from the Legislature to construct and operate a railroad.³

Authority given by statute to a railroad company to use a street, does not necessarily imply that the company has the right to the exclusive use of the street. In such a case the right is limited to an occupation reasonably demanded by the transaction of the business contemplated. The presumption that the corporation has taken the whole width of the right of way authorized by its charter has no application where the words of the grant imply merely a right of passage over a street. Thus the Act of March 20, 1860, P. L. 471, authorizing a railroad to construct its road "across or along such streets as it might find expedient to use," and the Act of March 29, 1871, P. L. 466, authorizing the use of so much of certain streets as might "be necessary for the construction of their

¹ *Pittsburg v. Pittsburg, Carnegie & Western R. R.*, 205 Pa. 13 (1903); reversing *S. C. 10 Dist. 541* (1901); 25 Pa. C. C. R. 425 (1901); 32 *Pitts. 87* (1901); see also *Weigold v. Pittsburgh, Carnegie & Western R. R.*, 208 Pa. 81 (1904.)

² *Philadelphia v. River Front R. R.*, 173 Pa. 334 (1896.)

³ *Philadelphia v. River Front R. R.*, 173 Pa. 334 (1896.)

tracks, sidings and branches," do not express a right to the exclusive occupancy of the streets.⁴

Where a railroad company has been given the right to erect an elevated structure over the intersection of two streets, the railroad company has not the right to take the full width of sixty feet for its right of way as provided by the general railroad law, for the width of a right of way, nor will the company in locating the overhead structure be presumed to have taken the width of sixty feet. The company takes only a right of passage over the streets, and can occupy no more space than is reasonably necessary for the purpose of passage. The erection of a structure less than sixty feet in width is a definition by the company of its needs, and a construction by it of the municipal grant. Such a structure exhausts the grant, and nothing more can be done without a new grant. If the erection of such a structure involves no actual taking of the land abutting on the street or streets a release by the company of land not actually occupied, or within the limits of the right of way occupied by the structure, will prevent a recovery by the owner of such land.⁵

Notwithstanding the charter of a railroad company granted in 1832 forbade it from locating its road on any turnpike further than to cross the same, the company may for its necessary purposes take the land occupied by a turnpike road. The Act of March 17, 1869, confers such right and is to be read into all charters granted prior to the general Act of 1849, P. L. 79.⁶

An injunction will not be granted where the plaintiff has delayed the filing of his bill until large sums of money had been expended by defendant in pursuance of a contract with a municipality, in which large public interests are involved, even if plaintiffs have a strict legal right.⁷

⁴ Penna. Schuylkill Val. R. R. v. Phila. & Read. R. R., 157 Pa. 42 (1893.)

⁵ Jones v. Erie & Wyoming Valley R. R., 169 Pa. 333 (1895.)

⁶ Philadelphia & Trenton R. R. v. Philadelphia & Bristol Pass. Ry. Co., 6 Dist. 269 (1897.)

⁷ Keeling v. Pittsburg, Virginia & Charleston Ry., 33 Pitts. 133 (1902); affirmed in 205 Pa. 31 (1903.)

Municipal Control—Watchmen, etc.

71. It is a reasonable exercise of the police power of a borough to pass an ordinance requiring a railroad company to keep a watchman at its own expense at dangerous crossings within the borough limits, but where a crossing is in the open country and there is no evidence to show to what extent it is frequented such an ordinance cannot be sustained.⁸

A municipality, incorporated under the Act of May 23, 1889, has no power to require a railroad company to provide and maintain electric or other lights at railroad crossings. An ordinance making such requirement is *ultra vires* and void.⁹

A railroad company will not be enjoined at the suit of a property owner from the erection of a watch-box upon the sidewalk in front of his property, ordered to be erected by councils.¹⁰

Obstruction of Streets.

72. The Act of April 12, 1851, which requires a railroad company under penalty to remove an obstruction from a crossing "after any agent or other person in the employment of the company shall have received at least fifteen minutes' notice" of the desire of the parties interested to use the crossing, does not mean that the railroad company under all circumstances is bound to remove the obstruction within fifteen minutes after notice, but it means that the railroad company is entitled to "at least fifteen minutes' notice" and as much more as the circumstances of the particular case may require, with the exercise on its part of proper energy and the use of suitable means. "The statute was intended to quicken the diligence of the railroad company and protect the rights of the landowners along its line by requiring prompt and energetic action on the part of the company to keep crossings free from obstructions. But it was not intended to require impossible or unreasonable things, nor to subject a company to a penalty because the re-

⁸ Com. *ex rel. v. Philadelphia, Harrisburg & Pittsburg R. R.*, 23 Super. Ct. 205 (1903.)

⁹ *Hazleton v. Lehigh Valley R. R.*, 10 Kulp 571 (1902); 11 Dist. 644 (1902.)

¹⁰ *Ledger v. Philadelphia & Reading Ry. Co.*, 12 Dist. 689 (1903.)

removal of an obstruction within fifteen minutes after notice was physically impossible."

The notice provided by the Act must be given to an agent of the railroad company in the locality, or to some employee who has some connection with the operation of the railroad. Notice to a mere track-walker engaged in cutting weeds and grass within the right of way, is not sufficient.¹¹

Under the Act of March 20, 1845, P. L. 191, the obstruction of a street crossing by a railroad company in unnecessarily stopping its cars thereon is unlawful.¹²

The obstruction of a city street by a railroad track upon which steam motive power is to be used must be authorized by the legislative branch of the municipal government; the consent of the chief of the bureau of highways is not sufficient even though the track was laid by a municipal contractor for the purpose of carrying out his contract with the city.¹³

Where an incline plane railway is built across a street, and the piers which support it are built upon lots belonging to the company in fee, and the structure does not rest upon it, or overhang any other person's property, either within or without the lines of the street, evidence that access to the property of a neighboring landowner is obstructed, is inadmissible; but evidence that a part of the abutment was so constructed that water was discharged against the brick wall of a house, so as to render the house untenable, is admissible.¹⁴

Where a railroad company occupies a street of a city before a grade is established and their tracks prevent the proper drainage of the street and interfere with the general use of the street by the public and the railroad company offers to place the track in proper condition conforming to the grade of the street when established, the city cannot compel the railroad company to grade the entire width of the street in advance of any action of its own.¹⁵

11 *Simon v. Baltimore & Ohio R. R.*, 173 Pa. 517 (1896.)

12 *Todd v. Philadelphia & Reading Ry. Co.*, 201 Pa. 558 (1902.)

13 *Denison v. Ryan*, 10 Dist. 495 (1901.)

14 *Hartman v. Pittsburgh Incline Plane Ry.*, 159 Pa. 442 (1894.)

15 *Lake Shore & Michigan Southern Ry. Co. v. Wiley*, 193 Pa. 496 (1899.)

Where a railroad company for purposes of its own constructs a fence across a public highway so that a person who has a hauling contract is compelled to use a longer route and suffers a material loss thereby, the railroad company is liable for the loss.¹⁶

Where a contractor engaged in constructing the approaches to a bridge obstructs a public road and a railroad company at another point in the road, dumps earth in order to give access to its station which had been cut off by the obstruction, so that the contractor is obliged to haul material from a greater distance and suffers thereby a material loss, the railroad company is not liable to the contractor for his loss, if in fact it dumped the earth for the purpose stated.¹⁷

If a railroad company takes possession of a railroad built by another company and there is under the railroad a defective sewer which diverts water upon the highway, the company will be responsible for the defective sewer after it takes possession.¹⁸

16 Knowles v. Pennsylvania R. R., 175 Pa. 623 (1896.)

17 Mellick v. Pennsylvania R. R., 203 Pa. 457 (1902), reversing 17 Super. Ct. 12 (1901.)

18 Coyle v. Pittsburg, Bessemer & Lake Erie R. R. Co., 18 Super. Ct. 235 (1901.)

CHAPTER XI.

FARM CROSSINGS.

73. Remedies.

74. Damages.

75. Future Uses.

76. Approach to a Wharf.

Remedies.

73. An Act of Assembly incorporating a railroad company made it the duty of the company to construct a sufficient causeway to enable the occupant of the land to cross over or under the road, and upon failure to do so the company should be liable to the party aggrieved for any damages sustained, such damages to be assessed by the appointment of seven viewers. The railroad company having neglected to maintain a sufficient causeway it was held that plaintiff could not have recourse to a common law action. Taylor, J., said: "Where the Legislature provides a specific remedy for the recovery of damages for injuries sustained by the construction of a work of internal improvement by a corporation, a party injured cannot have recourse to a common law action."¹

Where a railroad company settles with a landowner for its right of way by paying him damages and further agrees to put down a farm crossing, the remedy of the landowner to compel the railroad company to put down the farm crossing in accordance with its agreement, is not by bill in equity, but by proceedings under the general railroad law of February 19, 1849.²

Damages.

74. A causeway which a railroad is bound to furnish under the Act of February 19, 1849, Sec. 12, P. L. 84, is an inter-

¹ Davis v. Wheeling, Pittsburg & Baltimore R. R., 26 Pa. C. C. R. 527 (1902); 33 Pitts. 27 (1902); 12 Dist. 93 (1902.)

² Dimmick v. Delaware, Lackawanna & Western R. R., 180 Pa. 468 (1897.)

nal improvement or arrangement intended to afford the means of getting from one part of a tract of land to the other. It has no reference to road crossings, or to the means of getting off the premises to market or elsewhere. The measure of damages for failure to construct such a causeway is the inconvenience which the landowner has suffered in the enjoyment of his property arising out of such failure. The jury cannot consider as an element of damages in such a case the injury to the land caused by its being severed or by the inconvenient shapes of the severed parts, or by excavations or embankments or by obstruction of access to public or private ways. Such injuries are provided for in the assessment of damages for the original taking of the road.³

Future Uses.

75. The Act of February 19, 1849, which requires railways to construct causeways for the use of land through which the railroad is built, applies to what is necessary for the future as well as the present use of the land. Thus a railroad company will be enjoined from filling up a causeway, which, although not used at present, may be made necessary by the uses to which the land may be subjected in the future.⁴

Approach to a Wharf.

76. The Act of February 19, 1849, relating to passage ways over railroads, does not apply to a mere town lot, but applies to a wagon road leading to a wharf, and a bill in equity will lie against a railroad company to prevent its destruction. In such a case the remedy under the Act for failing to keep the road in order does not apply.⁵

3 *Port v. Huntingdon & Broad Top R. R.*, 168 Pa. 19 (1895.)

4 *Hespenheide v. King*, 31 Pitts. 242 (1901.)

5 *Hespenheide v. King*, 30 Pitts. 171 (1899.)

CHAPTER XII.

AGREEMENTS WITH LANDOWNER.

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| 77. Construction of Agreements. | 82. Agreements as to Stations. |
| 78. Agreement to Pay Stock for Right of Way. | 83. Agreements as to Fences. |
| 79. When Damages are to be Assessed Under Agreement. | 84. Agreements as to Employment. |
| 80. Deeds. | 85. Agreements as to Crossings. |
| 81. Boundaries. | 85*. Breach of Agreement. |

Construction of Agreements.

77. Contracts made by a railroad company with the landowner whereby privileges are wholly or in part obtained without condemnation are favorably regarded by the courts and are construed strongly in favor of the owner.

A railroad company secured by an agreement with the owner and not by the exercise of eminent domain, a right of way over a farm underlaid with coal. It appeared by the terms of the deed that the right of way was limited to a two track railroad; that the value of the coal was known to both parties at the time of the deed; that the farm was severed by the right of way, and that by the acts of the parties in erecting fences, walls and buildings the lines of the right of way were fixed and remained so for a long period of time.

By a bill in equity to restrain the railroad company from interfering with the building across its right of way an overhead bridge, it was held that the railroad company cannot prevent the owner of the land from erecting an overhead bridge across its right of way which will not interfere with the operation of its railroad, is not dangerous and is intended to be used for taking coal from one part of the land to the other, and is in substitution of a coal trestle which is to be taken down and abandoned.¹

¹ Mount Pleasant Coal Co. v. Delaware, Lackawanna & Western R. R. Co., 200 Pa. 434 (1901), reversing 6 Lacka. 1 (1900.)

The Act of April 16, 1838, P. L. 464, which provides that no person shall construct an overhead crossing over a railroad without permission in writing from the railroad company, was aimed at a wilful trespasser and was intended to guard its right of way from unauthorized intrusion, and does not apply to a person who has granted by deed to a railroad company a right of way across his land, reserving all the coal both outside and beneath the tracks, and containing a plain assertion of intent on the part of the owner to enjoy to the full his property as a coal property.²

Agreement to Pay Stock for Right of Way.

78. Where the directors of a railroad company accept agreements from landowners for right of way in consideration of the stock of the company, and the company actually begins work through an owner's farm, and has made considerable expenditures of money on such work, the notice of acceptance of the contract is sufficiently declared, and such acceptance is not too late by reason of the delay for over three years.³

When Damages Are to be Assessed Under Agreement.

79. Where a landowner under a written agreement releases a right of way to a railroad company "the damages to be assessed when the road is located," the damages are to be assessed at the time of the construction of the road, if the testimony shows that the damages claimed were only ascertainable upon the construction of the road. In such a case the word "located" is not to be given its technical meaning.⁴

Deeds.

80. Where the use of a right of way "wide enough for wagons and other uses" is conveyed to the grantee in a deed, and the width is not otherwise designated the grantee is entitled to a right of way of a reasonable width for a wagon road, wide enough for wagons to pass or turn around.⁵

2 Mount Pleasant Coal Company v. Delaware Lackawanna & Western R. R. Co., 200 Pa. 434 (1901), reversing 6 Lacka. 1 (1900.)

3 Hoffman v. Bloomsburg & Sullivan R. R., 157 Pa. 174 (1893.)

4 Hoffman v. Bloomsburg & Sullivan R. R., 157 Pa. 174 (1893.)

5 Beers v. Woodruff, 8 Lacka. 194 (1902.)

Boundaries.

81. In an action against a railroad company for alleged illegal occupation of lands a map over sixty years old found in the files in the proper office at the State capital and prepared by the Commonwealth to fix the location of land appropriated by the State for the purposes of a canal is admissible in evidence as an ancient document to show the boundary of land where it appears that a railroad company purchased the canal from the State and afterwards conveyed it to a canal company who afterwards re-conveyed it to the railroad company. It is not necessary to show that the map was framed and filed at the exact time the State entered upon the land of which the map purported to be the boundary. The map was not a paper between the parties as to boundary but a signification by the Commonwealth of the quantity taken by boundary leaving only open to objection on part of the landowner the amount of compensation, which would in no way affect the boundary.⁶

Agreements as to Stations.

82. Where a deed conveying land to a railroad company contains a condition that the company shall erect, at or near a place designated, a freight and passenger station with sidings for the convenient shipment of freight to and from the station, the character of the station to be maintained is to be determined by the deeds of the company and those who use it. If the company has erected a station which in structure and management does not differ from most of the stations on the road, it will be deemed to have sufficiently performed the condition.⁷

Agreements as to Fences.

83. A covenant by a railroad company in a deed for a portion of its right of way to "fence and keep said road fenced," is a covenant running with the land and is binding on a suc-

6 *Smucker v. Pennsylvania R. R.*, 188 Pa. 40 (1898), reversing 6 Super. Ct. 521 (1898.)

7 *Caldwell v. East Broad Top R. R. & Coal Co.*, 169 Pa. 99 (1895.)

cessor of a railroad company whose title comes through foreclosure sales.⁸

A landowner entered into the following agreement with a railroad company: "I will lease to the company which undertakes to construct such road the right of way of lawful width through my land in Orange township, Columbia County, Pennsylvania. The damages to be assessed when the road is located, and the amount of such damages to be paid in stock in said railroad. Cost of fencing not included in damages, provided no damage is done to the building, race or water power." It was held that the agreement was an actual release of the right of way and not merely a proposal, and that it meant that if no damage was done to the building, race or water power, no damage was to be allowed for the cost of fencing. It was also held that the stock which the landowner agreed to take should be assessed to him at par.⁹

Agreements as to Employment.

84. If a railroad company enters into an agreement with a landowner for a right of way, and covenants to employ the landowner and pay him a salary as station agent at a station to be built by himself on his own land, the company cannot revoke the contract in part by instituting proceedings to condemn the station lot, and at the same time retain the right of way, which was the main consideration. In such a case the company must either stand on the contract, or rescind *in toto*.¹⁰

Agreements as to Crossings.

85. Where a railroad company has agreed to purchase land for its right of way, and has covenanted to "construct and maintain a good and sufficient crossing over the right of way on said premises," and the railroad company has tendered a deed without any such provision, the landowner has a right to have executed a deed tendered by himself containing this

⁸ Kelly v. Nypano R. R., 200 Pa. 229 (1901), affirming s. c. 23 Pa. C. R. 177 (1899.)

⁹ Hoffman v. Bloomsburg & Sullivan R. R., 157 Pa. 174 (1893.)

¹⁰ Semple v. Cleveland, & Pittsburgh R. R., 172 Pa. 359 (1896); 26 Pitts. 240 (1896.)

clause: "Excepting and reserving unto the said parties of the first part, their heirs and assigns, forever, a good and sufficient right of way, causeway or railroad crossing over and across the said Clearfield & Mahoning Railway on the said premises of the parties of the first part, so that the occupant or occupants of the said premises of the parties of the first part may cross or pass over the said railroad on the premises with wagons, carts and implements of husbandry, as the occasion may require; said causeway or railroad crossing to be maintained by the said party of the second part; its successors and assigns."¹¹

If an owner of land over which a railroad company has a right of way enters into an agreement in writing by which in consideration of the railroad company consenting to the erection of an overhead crossing in a specified manner, the owner relinquishes his right to a grade crossing, the owner will be bound by the agreement, and he cannot thereafter use the grade crossing and also at the same time construct and maintain an overhead crossing.¹²

Breach of Agreement.

85*. Where a landowner agreed to convey a portion of his property to a railroad company for its right of way, the fact that the agreement was signed by him, in the belief that the conveyance would not prevent him from recovering damages to the remainder of his property by the construction of the railroad will not justify a court of equity refusing a decree of specific performance.¹³

Where the agent of a railroad company without disclosing his principal agrees orally with an owner of a homestead to purchase the property at a price named, but without any time fixed for the completion of the purchase the railroad company cannot, after the expiration of twenty months, demand a conveyance.¹⁴

11 *Hall v. Clearfield & Mahoning Ry. Co.*, 168 Pa. 64 (1895.)

12 *Speese v. Schuylkill River East Side R. R.*, 201 Pa. 568 (1902), affirming 10 Dist. 515 (1901.)

13 *Pittsburgh, Bessemer & Lake Erie R. R. Co. v. Glant*, 29 Pitts. 113 (1898.)

14 *Weigold v. Pittsburgh, Carnegie & Western R. R. Co.*, 208 Pa. 81 (1904.)

CHAPTER XIII.

CONSEQUENTIAL DAMAGES.

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| 86. Interference with Access. | 88. Diversion of Water. |
| 87. Taking of Water from Stream. | 89. Right of Mortgagee. |

Interference with Access.

86. Where a city undertakes a great public improvement, by which the tracks of a railroad are sunk below the level for the purpose of abolishing grade crossings and the city by ordinance assumes responsibility for "the construction and removal of temporary railroad tracks and the maintenance of railroad and highway travel during the construction," the railroad company is not liable to a property owner for an injury caused by the prevention of free ingress to and egress from his property resulting from the laying of a temporary track in front of his premises where no negligence in the operation of the road is shown.¹

Taking of Water from Stream.

87. A railroad company, by virtue of its right as a riparian owner on a stream, has a right to take water from the stream for ordinary domestic purposes, but has no right to use the stream in such a manner as to materially diminish the supply of the lower riparian owner.²

An injunction will not be granted at the suit of a railroad company to restrain a water company having the right of eminent domain from taking water from a stream where plaintiff derives its title to the water of the stream by virtue of leases from the riparian owner.

The right acquired under the leases having been obtained

¹ *McGrane v. Philadelphia & Reading Ry. Co.*, 20 Super. Ct. 200 (1902.)

² *Myers & Erwin Co. v. Philadelphia, Jenkintown & Cheltenham Pass. Ry. Co.*, 12 Montg. 46 (1896.)

from a riparian owner has no greater dignity than the right of the riparian owner himself. Riparian owners have no ownership of running water, no right to divert and sell it to strangers for general use and are limited in their own use of it to ordinary domestic purposes.³

A riparian owner has the right to remove and sell sand which has been deposited as alluvium between high and low water-mark on the bank of a navigable stream, provided that he does not interfere with the public rights of navigation, fishery and improvements, and if a railroad company for its own purposes and not for the improvement of the river, erects a structure on the opposite bank in such a way that the direction and flow of the current are changed, and the sand bank is swept away and future alluvium prevented, the riparian owner may, in an action of trespass against the railroad company, recover damages for the sand swept away and also for the loss of future alluvium.⁴

Diversion of Water.

88. Where a railroad company by changing the grade of a street diverts the natural flow of the water and carries it through a box drain under the road to the land of an adjoining owner, from whence it is then carried to the land of a third person, the railroad company is liable to such third person for injuries sustained, notwithstanding the owner of the land upon which the water is first thrown consents thereto, that the borough has consented to the construction of the drain and may be itself liable for the injuries, and that other land-owners may have contributed to the injury by making connection with the gutter so that refuse matter from their properties was carried through the box drain.⁵

Right of Mortgage.

89. A purchaser at sheriff's sale under foreclosure of a mortgage, which was a lien on the property appropriated by a

³ Philadelphia & Reading R. R. v. Pottsville Water Co., 182 Pa. 418 (1897), affirming 18 Pa. C. C. R. 501 (1896.)

⁴ Freeland v. Pennsylvania R. R. Co., 197 Pa. 529 (1901.)

⁵ Dennison v. Somerset & Cambria R. R. Co., 21 Super. Ct. 248 (1902.)

railroad company before the location of its line cannot recover by ejectment possession of the portion of the land included in the railroad company's right of way. Scott, J., said :

"It is clear that plaintiff took by sheriff's deed the interest of the mortgagor ; that the mortgage contract upon her estate when executed, was subject and subordinate to the right of the State at any time to resume its sovereignty in the land for public use upon making compensation to the owner and that until the franchise to the defendant is terminated and the use reverts to the plaintiff, she is not entitled to recover possession and defeat the Commonwealth's grant." ⁶

6 *Mack v. Eastern & Northern R. R.*, 7 North. 318 (1900) ; 10 Dist. 102 (1900.)

CHAPTER XIV.

REMEDIES FOR UNLAWFUL ENTRY ON LAND.

90. Injunction.

92. Trespass.

91. Ejectment.

Injunction.

90. An abutting property owner threatened with special injury due to interference with access is entitled to an injunction to restrain a railroad company from laying its tracks where the company has no authority to do so.¹

Under the Act of June 19, 1871, P. L. 1360, a court of equity at the suit of an abutting property owner may compel a manufacturing company without the right of eminent domain to remove a railroad which it has constructed in a street on which the plaintiff's property abuts.²

A person who is the owner of land abutting upon a street may maintain an injunction to restrain a railroad company from constructing a railroad siding longitudinally along the street higher than the established grade.³

An injunction will not be awarded to restrain the grading of a railroad where it appears that the injury alleged by complainant is not different in kind from that suffered by the general public. Such a condition is *damnum absque injuria*.⁴

Equity will not restrain a railroad company from entering on the lands of an owner where there is a dispute as to the title.⁵

1 Denison v. Ryan, 10 Dist. 495 (1901.)

2 Hopkins v. Catasauqua Manufacturing Co., 180 Pa. 199 (1897.)

3 Zook v. Pennsylvania R. R., 206 Pa. 603 (1903), affirming 20 Lanc. 322 (1903.)

4 Weihle v. Pennsylvania R. R., 8 Dist. 309 (1899.)

5 Laughlin v. Philadelphia & Reading Ry., 12 Dist. 772 (1903); 19 Montg. 98 (1903.)

Ejectment.

91. Daniel Biting conveyed in 1814 to Daniel Shang forty and one-quarter acres of land "excepting and forever reserving the graveyard on the land hereby conveyed at all times hereafter to enter thereon without the hinderance or denial of the said Daniel Shang, his heirs and assigns."

It was held that the clause in the deed "excepting and forever reserving the graveyard on the land hereby conveyed at all times hereafter to enter thereon without hinderance or denial of the said Daniel Shang, his heirs or assigns," constituted an exception saving to the grantor the fee of the land used as a graveyard and in an action of ejectment by the plaintiff to recover the land wrongfully occupied by the railroad company the plaintiff was allowed to recover even although plaintiff's ancestor previously brought an action on the case against the railroad company for depreciation in the value of his land where it appeared that the verdict which he had recovered had been set aside on the ground that he was mistaken in his form of action.⁶

A person having recovered for the depreciation in the permanent value of his property by the appropriation of a small part of it by a railway company cannot afterwards in an action of ejectment recover the land so appropriated.⁷

Trespass.

92. If a railroad company makes an entry upon land without the consent of the owner and without payment of compensation to him, the remedy of the landowner is by an action of trespass and not by petition for appointment of viewers.⁸

6 *Mannerback v. Pennsylvania R. R.*, 16 Super. Ct. 622 (1901.)

7 *Klugh v. Middletown, H. & S. Ry. Co.*, 17 Pa. C. C. R. 373 (1896.)

8 *Mountz v. Philadelphia, Harrisburg & Pittsburg R. R. Co.*, 203 Pa. 128 (1902.)

CHAPTER XV.

TAKING OF PROPERTY DEVOTED TO PUBLIC USE.

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| 93. Property of Gas Company. | 97. Practice Under Act of June |
| 94. Property of Bridge Company. | 19, 1871. |
| 95. Crossings Over Highways. | 98. Crossings of Street Railways. |
| 96. Regulation of Crossings Under Act of June 19, 1871. | |

Property of Gas Company.

93. An injunction will be granted to restrain a railroad company from entering and taking possession of land of a gas company for the purpose of constructing an additional track where it appears that the land is necessary for the present and future uses of the gas company and that the taking of such land is merely for the convenience and economy of the railroad company.

Chief Justice Sterrett said: "It is quite apparent from the master's conclusions that there exists no necessity that impels defendant to take plaintiff's land for its additional track. It is simply a question of economy or convenience or both combined. This is not sufficient to justify the taking of property which has heretofore been acquired under the right of eminent domain and for many years devoted to public use by another corporation. As was said by Mr. Justice Gordon in Pennsylvania Railroad Co.'s Appeal, 93 Pa. 159: 'It is true that franchise is property and as such may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It may not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with

or extinction of previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense, in fact at the will of the holder of the latest franchise.' ”

Mr. Justice Paxson, in *Pittsburgh Junction Railroad Co.'s Appeal*, 122 Pa. 511, employed language especially applicable to the case at bar: “The location claimed for the defendant is a matter of economy not of necessity. It can construct its road and reach its terminus by another route. It is true it would be expensive, but it is a mere question of money and engineering skill. It is not entitled to run through plaintiff's yard and cripple its facilities for handling its business, merely to save money.” In *Sharon Railway Company's Appeal*, 122 Pa. 533, the same learned Justice, reiterating the same principle, says: “It is settled law and rests upon sound principles.” The same principle is reaffirmed in *Groff's Appeal*, 128 Pa. 633, and again in *Perry County Railroad Extension Co. v. Newport & Sherman Valley Railroad Co.*, 150 Pa. 200.”¹

Property of Bridge Company.

94. Land belonging to a bridge company not in actual use, which is a necessity to a railroad company for the purpose of additional tracks, which necessity can be met in no other way, may be condemned by a railroad company, although the bridge company contemplated using a portion of the land for the erection of a toll house, where it appears that the toll house may be erected upon steel bents between the tracks.²

A bridge company cannot be required to construct an overhead crossing on a highway crossed by a railroad at grade, nor restrained from erecting a bridge across a river, although the result of the construction of such bridge will be to increase travel on the highway.³

¹ *Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 192 Pa. 80 (1899.)

² *Youghiogheny Bridge Co. v. Pittsburg & Connellsville R. R.*, 201 Pa. 457 (1902.)

³ *Lehigh Valley R. R. v. Laceyville & Horseheads Bridge Co.*, 23 Pa. C. C. R. 225 (1893.)

Crossings Over Highways.

95. The Act of June 19, 1871, P. L. 1360, gives to the courts no authority to regulate grade crossings of railroads over ordinary streets and highways.⁴

The Act of June 7, 1901, P. L. 531, now regulates crossings over highways.⁵

In *Mifflinville Bridge*, 206 Pa. 420 (1903), the court said: "The settled policy of this State, legislative and judicial, is against the further increase of grade crossings. The Act of June 19, 1871, gave the courts jurisdiction over crossings of one railroad by another at grade and this court has more than once expressed its regret that the control did not extend to the crossing of a railroad and an ordinary highway. This control the Act of June 7, 1901, has now given. Any grade crossing which thereafter comes before the court comes with a heavy burden of proof upon it under the conceded facts. The crossing involved in this controversy is a new grade crossing and as such is prohibited by the Act of 1901. The fact that it is incidental to the relocation of an existing highway under the Act of 1836 does not relieve it from the ban of the Act of 1901. The language of Sec. 1 of the Act of 1901 is that 'all crossings hereafter established' shall be above or below grade. This is a crossing in a different place and is, therefore, 'established' after the date of the Act. The provisions of Sec. 4 of the Act of June 7, 1901, which authorizes the Court of Common Pleas to permit grade crossings under certain conditions must be strictly followed, and there is no substitute for them either in manner or form. Previous proceedings in the Quarter Sessions, although before the same judge cannot be considered as a substitute for the proceedings provided for in Sec. 4."

4 *Bryner v. Youghiogheny Bridge Co.*, 190 Pa. 617 (1899); *Pittsburg & Lake Erie R. R. v. Lawrence County*, 198 Pa. 1 (1901); *Philadelphia & Baltimore Central R. R. v. Upper Darby Township*, 202 Pa. 429 (1902); *Bonsall Ave.*, 16 Super. Ct. 1 (1901.)

5 The courts could not apply the Act of June 7, 1901, before the date fixed for its going into effect.—*Philadelphia & Baltimore Central R. R. v. Upper Darby Township*, 8 Del. 406 (1902); 202 Pa. 429 (1902), affirming 8 Del. 280 (1901.)

In an action by a borough against a railroad company the evidence showed that a turntable which had been in use for thirty years was in a dilapidated condition, needing immediate repairs. The railroad company proposed to abolish the turntable and to construct a "Y." By using the "Y" three grade crossings on the same street would be made within a distance of five hundred and fifty feet, and it would be necessary to cross the street at grade at least fifty-two times daily, one half of these crossings being made while the engine was moving backward. The evidence established the fact that the action of the railroad company in abolishing the turntable was based upon a mere saving of expense. It was held that the evidence did not justify the court in permitting the "Y" to be made.⁶

Regulations of Crossings Under Act of June 19, 1871.

96. It is the well settled policy of this State as administered by the Supreme Court that no grade crossing of a railroad over another railroad or a common highway will be permitted, except in case of manifest and unavoidable necessity.⁷

Among the considerations which will control the court in determining whether or not an overhead crossing shall be decreed are the location and surroundings of the proposed crossing, the character of the railroads and the uses made and intended to be made of them, the increased cost of construction and expenses of operation, the public safety and convenience, and the interest and convenience of the road intended to be crossed.

Four grade crossings within eight miles will not be permitted where it appears that it is reasonably practicable to construct overhead crossings at a cost of twelve to fifteen thousand dollars for each crossing.⁸

6 *Norristown Borough v. Philadelphia & Reading Ry. & Stony Creek R. R.*, 17 Montg. 72 (1901); 10 Dist. 539 (1901.)

7 *Pittsburg & Lake Erie R. R. v. Lawrence County*, 198 Pa. 1 (1901); *Pittsburgh Junction R. R. v. Fort Pitt Pass. Ry.*, 192 Pa. 44 (1899); 29 Pitts. 405 (1899.)

8 *Altoona & Philipsburg Connecting R. R. v. Tyrone & Clearfield R. R.*, 160 Pa. 623 (1894); *Delaware & Hudson Canal Co. v. Lackawanna*

A railroad company will not be compelled under the Act of June 19, 1871, P. L. 1361, to construct an overhead crossing where the cost of such crossing would be so great as to prevent the building of the railroad.⁹

Assuming that under the Act of 1871 the question of cost may be considered by the court in determining the reasonableness of a crossing it can have no weight where the additional expense of an overhead crossing will not be over six to eight thousand dollars.¹⁰

The cost of avoiding a grade crossing cannot be considered as a serious obstacle, but where the expense is such as to practically eliminate the improvement, the expense itself is a strong argument to show that the topography requires a grade crossing. The cost of constructing an underground crossing would amount to about \$40,000, while the cost of the proposed electric railway inclusive of the grade crossing would amount to about \$15,000. Swartz, J., said: "We are aware that later cases, *Traction Co. v. Canal Co.*, 180 Pa. 636; *Perry County R. R. v. R. R.*, 150 Pa. 193, do not attach much weight to the increased cost of construction to avoid a grade crossing. In the earlier cases this was given as one of the circumstances to be considered in determining whether it was reasonably practicable to avoid a grade crossing: *Northern Central Railway Co.'s Appeal*, 103 Pa. 629. If the cost is not to be considered in these cases then it is difficult to conceive of any insurmountable obstacles that engineering skill and capital cannot overcome to avoid a grade crossing. It is true that expense should not outweigh the safety of life and limb; but this assumes that the expense is such that should be borne to avoid the grade crossing. Men will not invest their money for public im-

Valley Traction Co., 2 Lacka. 295 (1896); *Pennsylvania R. R. v. Warren St. Ry.*, 188 Pa. 74 (1898); *Scranton & Pittston Traction Co. v. Delaware & Hudson Canal Co.*, 180 Pa. 636 (1897), reversing 1 Super. Ct. 409 (1896); *Pittsburg Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899.)

⁹ *Pennsylvania Schuylkill Valley R. R. v. Philadelphia & Reading R. R.*, 160 Pa. 277 (1894.)

¹⁰ *Scranton & Pittston Traction Co. v. Delaware & Hudson Canal Co.*, 180 Pa. 636 (1897), reversing 1 Super. Ct. 409 (1896); *Pittsburg Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899.)

provements unless there is some chance to secure a return, and the question may, therefore, arise whether a community should be deprived of the well-recognized public conveniences because there is some danger attending their operation. Street railways are authorized by law to accommodate the needs of the public. The law should be interpreted, if possible, so as to give the accommodation where the need is apparent. We think the expense is such a serious matter in the present controversy that it should not be eliminated altogether from the case. It seems to us that the expense itself is a strong argument to show that the topography requires a grade crossing." ¹¹

Plaintiff proposed to cross by means of a bridge with sufficient span and headway to cause no interference with the defendant's tracks. The plaintiff's chief engineer testified that at the point selected for crossing the least injury would be done to the defendant's property; and the defendant's chief engineer testified that the point selected was as good as any that could be found in that vicinity, and that a bridge with a clear span of sixty feet and a height of twenty-two feet would not be an obstruction and would give sufficient room for four tracks. This was the only testimony upon the subject. The crossing was directed to be made by a bridge constructed on a plan suggested by the chief engineer of the defendants. It was held that the decree was proper. ¹²

The rights of the first occupant of the ground in pursuance of law are recognized as superior to those of the new claimant. Every reasonable intendment must be taken in favor of the primary rights of the complainant at the points of the alleged conflict. No actual encroachment upon these rights can be sanctioned or allowed and in measuring their extent there must be a liberal consideration for the future as well as existing necessities, the use of the existing tracks, the construction of additional ones, the convenient storage of freight at all seasons, and the unembarrassed transaction of all business. ¹³

¹¹ *Perkiomen R. R. v. Collegeville Electric St. Ry. & Schuylkill Valley Trac. Co.*, 14 Montg. 13 (1897.)

¹² *Buffalo & St. Mary's R. R. v. Phila. & Erie R. R.*, 174 Pa. 263 (1896.)

¹³ *Smethport R. R. Co. v. Pittsburgh, Shawmut & Northern R. R.*, 203 Pa. 176 (1902.)

A railroad company will not be permitted to cross the track of an older railroad company in such a manner as to deprive the older company at the point of crossing of the use of about three-fourths of its right of way, leaving to it at the place of the proposed crossing space sufficient for only a single track where the evidence shows that the future needs of the older company will require two tracks and a large siding, and that the company has an extensive mileage and business.¹⁴

On a bill in equity under the Act of June 19, 1871, to regulate the crossing of one railroad by another, the court will not consider the question as to the right of the plaintiff company to cross streets, and whether the consent of the municipality had been obtained for the construction of its line, where such questions are not raised by the pleadings. "It cannot be pretended that the Act of 1871, Sec. 1, in saying that it shall be the duty of the court, in such a proceeding as this, to inquire into the power of a corporation to do the act complained of, meant to make the question of the existence of such power an issue in every case, or an element in its decision, without or beyond any issue made by the pleadings concerning the same. A statute is not to be construed as intended to change the law beyond its immediate scope and purpose."¹⁵

A railroad company, whose tracks are crossed by those of a narrow gauge railroad company and whose duty it is to maintain a crossing, has a standing under the Act of June 19, 1871, to raise the question of the narrow gauge company's right to widen its gauge.¹⁶

A bill will not lie by a railroad company, to restrain another company from building an overhead crossing, because of the failure of the latter to complete its line within the five year liminary period provided by Sec. 5 of the Act of April 4, 1868.¹⁷

14 *Smethport R. R. Co. v. Pittsburg, Shawmut & Northern R. R.*, 203 Pa. 176 (1902.)

15 *Pennsylvania Schuylkill Valley R. R. v. Philadelphia & Reading R. R.*, 160 Pa. 277 (1894.)

16 *Western New York & Pennsylvania Ry. Co. v. Buffalo, Rochester & Pittsburg Ry.*, 193 Pa. 127 (1899.)

17 *Pittsburg & Castle Shannon R. R. v. West Side Belt R. R.*, 33 Pitts. 11 (1902.)

The Act of June 19, 1871, P. L. 1361, Sec. 2, does not apply where the parties have established a crossing and are using it.¹⁸

A railroad company will not be restrained by preliminary injunction from constructing a siding over a country road at grade, where other grade crossings will be avoided and the public safety and convenience enhanced.¹⁹

In *Perkiomen R. R. v. Collegeville Elec. Str. Ry. & Schuylkill Valley Trac. Co.*, 14 Montg. 22 (1898), a decree allowing the traction company to cross at grade the tracks of a railroad company was as follows:

1. The time and manner of constructing said crossing, and the character of said construction shall be subject to the direction and supervision of the superintendent of the railroad company.

2. The defendant company shall in accordance with the method or plan of crossing agreed upon between plaintiff and defendants lay and construct at said point of crossing the necessary frogs and appurtenances to effect the same, said frogs to be of a pattern satisfactory to the railroad company. The defendant company shall in the usual manner plank said crossing between the rails of the railroad company and for at least four feet beyond the outer rail on each side of the same for the full widths of the right of way of the railroad company; and shall provide and place in its (defendant's) tracks at a distance of not less than one hundred feet (unless a shorter distance is mutually agreed upon) on either side of the railroad company's track throw off points or derailling switches, that can only be closed or operated from the centre of the railroad company's tracks at the point of crossing and of such further character and in such exact location as shall be directed by the superintendent of the railroad company. The crossing is to be kept and maintained in the centre of the street, as laid out at the point of crossing, and in the event of additional track being

¹⁸ *Western New York & Pennsylvania Ry. Co. v. Buffalo, Rochester & Pittsburg Ry.*, 193 Pa. 127 (1899.)

¹⁹ *Abington Township v. Philadelphia & Reading Ry.*, 17 Montg. 162 (1901); 10 Dist. 719 (1901.)

laid at said point of crossing it shall and will put in the additional frog and appurtenances thereby required.

3. The defendant company shall pay the costs of a watchman employed by the railroad company at an extent not to exceed one dollar per day, and said watchman shall at least be in attendance from seven o'clock in the morning until seven o'clock in the evening each and every day; and all the expense of the construction and maintenance of said crossing and of the men in attendance thereon shall and will be assumed and promptly paid by the defendant company on their rendering bills for the same. The railroad company, however, is to have control of said maintenance, which is to be exercised at its best discretion. It is understood and agreed that the expression "maintenance" embraces any and all character of work necessary or desirable to secure and continue the safety of the said crossing, and includes all changes in grade to conform to the grades of streets as established from time to time by the municipal authorities or to the grades of the railroad if the same should at any time for any cause be changed.

4. The defendant company shall construct its trolley or other wires used in connection with the operation of its railway so as to suspend them over the tracks and right of way of the railroad company at a minimum distance of twenty-two feet in the clear above the rails of the railroad company and such electric wires at the point of crossing shall be protected by guard wires, line wires or cables having a good insulation so as to prevent the electric wires from falling on the railroad or passing trains, should they break, and to prevent the telegraph wires along the railroad of the railroad company from coming in contact with the electric wires of the defendant company.

5. The railroad company shall have the right of way at all times at said grade crossing, and when any of the cars of the defendant company shall approach the crossing of the tracks of the railroad company such cars shall, before crossing, come to a full stop and the conductor thereof shall go ahead to the crossing and such cars shall not be permitted to cross until after the said conductor shall have signaled to the motorman that it is safe to do so.

6. The method of laying conduits under and across the

tracks of the railroad company shall be subject to the approval of the superintendent of the railroad company and all digging of trenches and laying of conduits shall be done under the supervision and direction of the said superintendent at the sole expense of the defendant company.

7. In the event of any accident, loss or damage occurring or received at said crossing the defendant company shall and will indemnify and save harmless the railroad company of and from any and all claims and liability or responsibility for or on account of the same unless such accident, loss or damage shall have been caused by negligence of the agents or employees of the railroad company.

8. In case there should be a difference of opinion between the plaintiffs and defendants as to the cause of any such accident, loss or damage the question of fact shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two so chosen. Should either party fail to choose an arbitrator after ten days' notice so to do by the other party, the other party shall appoint an arbitrator for the one in default and the two so chosen shall choose the third arbitrator. In case in any event the two arbitrators chosen do not within ten days of their selection choose a third arbitrator either party may apply to the Court of Common Pleas of Montgomery County for the appointment of a third arbitrator. In each and every case the decision of the three arbitrators or of a majority of them shall be final and conclusive on the parties.

9. This decree shall extend to and be binding upon the successors and assigns of both plaintiff and defendant parties hereto.

Practice Under Act of June 19, 1871.

97. In proceedings under the Act of June 19, 1871, the court below should find and state briefly and clearly the facts of the case.²⁰

Under the Act of June 19, 1871, where a court of equity in proceedings to regulate the crossing of one railroad by an-

²⁰ *Smethport R. R. Co. v. Pittsburg, Shawmut & Northern R. R.*, 203 Pa. 176 (1902.)

other decrees a temporary crossing for construction purposes, the court should designate a time limit for the temporary grade crossing.²¹

It is not proper practice to grant a preliminary injunction to restrain interference with a grade crossing which the complainant company proposes to construct, inasmuch as such an injunction would not tend to preserve the *status quo* pending the litigation, but to destroy it.²²

An appeal may be taken from an order or decree of the court regulating a grade crossing under the Act of 1871, and under certain circumstances may be declared a *supersedeas*. Thus where an appeal had been regularly taken without any order of the lower court, and recognizance conditioned to prosecute the appeal with effect has been given by appellant, and approved by the court, the appeal will operate as a *supersedeas* of all proceedings by the opposite party.²³

Crossings of Street Railways.

98. The Act of June 19, 1871, P. L. 1361, relating to railroad crossings applies where an electric railway company proposes to cross a steam railroad. Where it appears that the construction of a bridge over an existing railroad grade crossing of a public highway which is very dangerous, in order to accommodate electric railway cars and other public travel along the highway, is in relief of the railroad company and its traffic, the railroad company must pay its due proportion of the expense of building such a bridge.²⁴

In such a case the fact that the railroad company constructed its grade crossing four years before the filing of the bill does not establish a right to continue such crossing for all time, or under changed conditions.²⁵

On a bill in equity under the Act of June 19, 1871, to regu-

²¹ Smethport R. R. Co. v. Pittsburg, Shawmut & Northern R. R., 203 Pa. 176 (1902.)

²² Chester Traction Co. v. Union Ry. Co., 174 Pa. 284 (1896.)

²³ Citizens' Pass. Ry. v. East Harrisburg Pass. Ry., 161 Pa. 121 (1894.)

²⁴ See Chapter XLVIII Street Railways.

²⁵ Pennsylvania R. R. v. Conshohocken Ry., 15 Pa. C. C. R. 454 (1894); 4 Dist. 12 (1894); 10 Montg. 209 (1894.)

late the crossing of a railroad by a street railway, the street railway company has no standing to object that the railroad company has no authority under its charter to maintain a steam railroad at the place where the crossing is desired, where it appears that the railroad company had operated its road for nearly thirty years, ran more than fifty trains a day over it and that the Commonwealth had in numerous instances recognized the validity of the power as originally exercised by the defendant's predecessor in title.²⁶

In determining whether a grade crossing of a steam railroad and a street railway company may or may not be avoided, the court will not consider the expense of an overhead structure, nor its unsightliness, nor the fact that damages may have to be paid to the owners of private property by reason of the erection of such structure; nor that an overhead structure will interfere with travel on the street, would frighten horses, and will obstruct the view of incoming trains, nor that local sentiment is in favor of the grade crossing.²⁷

An electric railway company will not be permitted to cross the tracks of a railroad at grade where it appears that there is no physical obstacle to the construction of an overhead crossing; that the whole distance to be occupied by the structure would be only seven hundred feet along a street forty feet wide, leaving twenty-four feet in the clear for street travel and would cost only \$4,000.²⁸

On a bill in equity by a steam railroad company against a street railway company to enjoin a grade crossing, it appeared that the former company's tracks crossed a street intended to be occupied by the street railway in a depression, the surface of the ground ascending in both directions from the tracks, that the street in question was very much crowded, a thousand ve-

²⁶ *Carlisle & Mount Holly Ry. Co. v. Philadelphia, Harrisburg & Pittsburgh R. R.*, 199 Pa. 532 (1901.)

²⁷ *Pennsylvania Railroad Company v. Warren Street Railway Co.*, 188 Pa. 74 (1898); *Williams Valley R. R. Co. v. Lykens and Williams Street Railway*, 192 Pa. 552 (1899); *Chester Traction Co. v. Philadelphia, Wilmington & Baltimore R. R.*, 188 Pa. 105 (1898); *Baltimore & Ohio R. R. Co. v. Butler Pass. Ry.*, 207 Pa. 406 (1904.)

²⁸ *Pennsylvania R. R. Co. v. Warren Str. Ry. Co.*, 188 Pa. 74 (1898.)

hicles passing daily, that thirty-four scheduled trains, beside extra trains passed the crossing, and that it was practicable to build an overhead crossing, eight hundred feet long. It was held that the court below committed no error in granting an injunction.²⁹

The evidence showed that there was no physical obstacle to the erection of an overhead crossing; that there were no adjoining owners of property whose property would be interfered with and that the cost of an overhead structure would not exceed twenty-five hundred dollars. The court reversed a decree for a grade crossing and ordered that the street railway company be enjoined from crossing the railroad company's tracks at grade.³⁰

On a bill for an injunction to restrain the defendant railroad company from interfering with the maintenance of a street railway or trolley wire crossing defendant's tracks and praying the court to make a decree for the manner of constructing the railway over the railroad it appeared that the city in which the grade crossing was sought to be established contained a population of twenty-five thousand inhabitants; that at the proposed crossing one hundred passenger trains and nearly the same number of freight trains pass in twenty-four hours; that the electric railway company carries over three million passengers yearly; that the electric railway company has a grade crossing only twenty feet from the proposed crossing and another only four squares distant; that the proposed crossing is sought by the electric railway company solely to promote convenience in operating its road, and that it is reasonably practicable to avoid the grade by an overhead crossing. It was held that a grade crossing would not be allowed.³¹

The practicability of an overhead crossing is not to be determined by the financial ability of the road seeking to cross, but by the physical practicability of avoiding the grade cross-

29 *Baltimore & Ohio R. R. Co. v. Butler Pass. Ry.*, 207 Pa. 406 (1904.)

30 *New York Central & Hudson River R. R. Co. v. Warren Str. Ry. Co.*, 188 Pa. 85 (1898.)

31 *Union Railway Company & Chester Traction Co. v. Philadelphia, Wilmington & Baltimore R. R.*, 188 Pa. 115 (1898); 7 Del. 281 (1898), reversing 6 Del. 481 (1896.)

ing. Thus where the capital stock of a street railway company which carried annually three million passengers over a crossing distant three hundred and ninety-five feet from the proposed grade crossing was but \$500,000 and the cost of avoiding the grade crossing by one overhead would be from \$150,000 to \$200,000, the financial inability of the company is not a test to determine whether an improvement to carry safely three million passengers each year is reasonably practical. A corporation which undertakes to carry safely three millions of passengers annually should provide a capital sufficient to build a superstructure which will not subject this multitude to avoidable risk at a crossing.³²

Where it appears that a street railway company has two grade crossings over defendant's railroad tracks the mere fact that they are not of sufficient capacity to enable the company to quickly move its cars does not constitute such "imperious necessity" as would justify a court of equity in decreeing another grade crossing inasmuch as grade crossings are not to be established to promote the mere convenience of the railroad seeking to cross. The Act of 1871 is in effect a mandate to the courts to prohibit grade crossings unless under or over ones are physically impracticable and unless crossings be an imperious necessity. The courts have no power to determine how they shall be avoided or equitably to apportion the expense among those interested.³³

Upon a bill to prevent a street railway company from crossing a railroad company's tracks at grade the fact that there are other grade crossings in the same city over which more trains pass than over the proposed crossing is no argument in favor of sanctioning the maintenance of another grade crossing of a dangerous character.³⁴

³² *Chester Trac. Co. & Union Ry. Co. v. Philadelphia, Wilmington & Baltimore R. R.*, 188 Pa. 105 (1898); 7 Del. 281 (1898), reversing 6 Del. 481 (1896.)

³³ *Chester Traction Co. & Union Ry. Co. v. Philadelphia, Wilmington & Baltimore R. R.*, 188 Pa. 105 (1898); 7 Del. 281 (1898), reversing 6 Del. 481 (1896.)

³⁴ *Pittsburgh Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899); 29 Pitts. 405 (1899.)

Where the undisputed evidence as to the topography of the neighborhood, the surroundings of the crossing, and the extent to which the latter is used by both companies, establishes that a grade crossing is exceedingly dangerous and it appears that the natural growth of the city and consequent increase of travel and traffic on the street and over the railroad will necessarily render the crossing more and more dangerous every year, a grade crossing will not be permitted.³⁵

Where upon application for an injunction by a steam railroad company to prevent an electric railway company from crossing its tracks at grade it appeared that the public road on which the street railway was built for between three hundred and four hundred feet on each side of the railroad was almost level; that an overhead bridge presented no engineering difficulties in the construction or use and that the cost of an overhead crossing would be from seven to ten thousand dollars, the court will enjoin the street railway company from crossing at grade. Dean, J., said: "Our utterances on the question of grade crossings have been so frequent and emphatic that it ought not to be necessary to repeat them. In *Railroad Co. v. Railroad Co.*, 150 Pa. 193; *Penna. R. Co. v. Railway Co.*, 152 Pa. 116, and quite a number of cases following these we have held in substance that the manifest purpose of the Act of 1871 was to discourage grade crossings and to absolutely prohibit them where it was reasonably practicable to avoid them; that what is reasonably practicable under such circumstances is determined largely by what is physically practicable and not by what is practicable to the treasury of the road seeking to cross; that the cost of avoiding a grade crossing is a matter to be considered in projecting a new road and that then sufficient capital should be provided to avoid that which the law in effect condemned. And further we have held in all these cases that neither the street railway Act of 1889 nor any subsequent legislation repealed the crossing provision in the Act of 1871. As said by our Brother Green, in *Railroad Co. v. Street Railway Co.*, 188 Pa. 74: The one test imposed by the statute is the

³⁵ *Pittsburgh Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899); 29 Pitts. 405 (1899.)

reasonable practicability of the overhead crossing. If that is established other considerations become unimportant. We desire to announce again that we firmly adhere to the policy and to the rules and principles expressed in the decisions to which we have referred." 36

Where the practicability of an overhead crossing is established and the expense to construct it but light compared with the danger to be avoided the court will not permit a grade crossing. Accordingly in a case where the practicability of an overhead crossing was established and the expense of constructing it but light, it appeared that the approaches for the overhead crossing would be elevated for some distance on each side above the level of the street on which property owners have constructed their buildings; the owners allege that such elevated structure on the highway imposed an additional servitude upon their property and they will not consent thereto; the traction company not having the right of eminent domain under the Acts of 1887 and 1889 cannot on payment of damages proceed with the construction in the absence of agreement. In holding that this fact had no weight in determining what is reasonably practicable as applied to a grade crossing under the Act of 1871, Mr. Justice Dean said: "The traction company in effect says we have no power under our charter to construct a reasonably practicable overhead crossing as required by law, therefore as to us a crossing except at grade is impracticable. But the reasonably practicable is not to be determined by want of corporate power to invade the rights of the property owner. The construction of the crossing is what the statute expressly says shall be regulated by the courts, and this with a view to avoid danger and protect the older franchise from injury by the younger one. The Act of 1889 gives the right to cross at grade, but then we are met by the Act of 1871 which says the court shall by its process prevent it if an overhead crossing be reasonably practicable. This leaves for the court the physical problem to be solved by the inference warranted from the character of the two roads, the business done

36 *Williams Valley R. R. v. Lykens & Williams Str. Ry. Co.*, 192 Pa. 552 (1899), reversing s. c. 1 Dauph. 225 (1898.)

upon them, the topography of the territory and like facts. To go outside of this class and determine the reasonable practicability of a grade crossing because of the absence of corporate power to invade private rights would necessarily lead us to authorized disregard of the Act of 1871 or into supplying in the Act of 1889 a power which the Legislature has not granted. The Commonwealth has given to electric railway companies the right to lay their rails on the streets and highways with the consent of the municipal authorities and impliedly power to injure private property along such highways with the consent of the owners, for while the statute as to the last named is silent the Constitution is very expressive. But if the consent of either be denied we can neither authorize the companies to disregard the law nor supply a power which as yet they have not. After a thorough consideration we are determined to unflinchingly adhere to the rule announced in *Perry County Railroad v. Newport, etc. Railroad*, 150 Pa. 193; *Penna. R. R. Co. v. Braddock Electric Ry. Co.*, 152 Pa. 116, and subsequent cases." ³⁷

A bill was filed to prevent defendants from constructing a bridge over the tracks and property of the plaintiffs at a point where there was no street or highway, and also to prevent the construction of an overhead way across a street on which plaintiffs own property in fee. It appeared from the evidence that the plaintiff stood by while the tracks of defendant were being laid on an avenue nearly parallel to the tracks of the plaintiff. It further appeared that plaintiff, without objecting to a grade crossing, negotiated with defendant as to the manner of its construction, and that when its demands were acceded to objected to a grade crossing and suggested an overhead crossing which defendant adopted and in carrying out the suggestion expended \$40,000, it was held that the injunction asked for was properly refused.³⁸

The crossing company must show its authority. A railroad

³⁷ *Scranton & Pittston Traction Co. v. Delaware & Hudson Canal Co.*, 180 Pa. 636 (1897), reversing 1 Super. Ct. 409 (1896.)

³⁸ *Pennsylvania R. R. & Pittsburg, Virginia & Charleston Ry. v. Glenwood & Dravosburg Elec. Str. Ry. & Second Ave. Trac. Co.*, 184 Pa. 227 (1898.)

company which had located but had not constructed a branch across a public road, may maintain a bill in equity for an injunction against a street railway company to prevent the construction of a street railway across the branch at grade until the rights of the companies at the crossing are determined, and a preliminary injunction which had been granted will be continued, where it appears that the right of the street railway company to construct its line is doubtful.³⁹

³⁹ *Ohio River Junction R. R. v. Freedom & Conway Elec. Str. Ry.*, 204 Pa. 127 (1902.)

CHAPTER XVI.

CARRIERS OF PASSENGERS.

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|-------------------------------------|------------------------------------|
| 99. Who are Passengers. | 104. Mileage Tickets. |
| 100. Care of Passengers. | 105. Excursion Tickets. |
| 101. Municipal Regulation of Rates. | 106. Tickets Bought from Scalpers. |
| 102. Tender of \$5 bill. | 107. Free Pass. |
| 103. Tickets for Connecting Lines. | 108. Street Railway Transfers. |

Who Are Passengers.

99. Plaintiff's husband was employed by a railroad company to work on a bridge. Under his contract of employment he was to be furnished with free transportation to and from his home to his work. While returning to his home after his day's work, a freight train of the company crashed into the rear end of the passenger car in which he was riding and plaintiff's husband was killed. The court held that he was a passenger, and not an employee within the rule that he could not recover for injuries caused by the negligence of a fellow servant.¹

Care of Passengers.

100. The rule that a carrier of passengers is bound to exercise the highest degree of care that is possible to human foresight and prudence, does not require a construction that will make the carrier an insurer against accidents; nor the prevention of accidents by the employment of means which if the accident could have been foretold, might have been used to prevent it, nor for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury; nor for an impracticable character or extent of precaution

¹ McNulty v. Pennsylvania R. R., 182 Pa. 479 (1897); 28 Pitts. 149 (1897.)

which could not be observed without so ruinous a cost as to destroy the business; and in all cases the liability is only such as results from negligence.²

A conductor has general power and control over his train, and all persons on it, with authority to compel observance of the regulations of the company to preserve order, and to employ the whole force of the trainmen, and of passengers willing to assist for these purposes. These extensive powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties. He is not required, however, to enter into a contest with or put himself in opposition to the officers of the law, and if he merely stands by without taking part in an arrest by known policemen, he is not necessarily bound to inquire into their authority, or to assert his own against it.

In an action against a railroad company by a passenger to recover damages for a wrongful arrest, it appeared that a railroad detective telegraphed to the conductor on the train on which plaintiff was a passenger to have two passengers, who were described in the telegram, arrested at a designated station. The telegram arrived at the station ahead of the train, and the baggage-master of the station received it and summoned policemen to await the arrival of the train. Upon the arrival of the train the policemen entered the car, and according to some of the testimony the conductor pointed plaintiff out as one of the men he arrested. The policemen thereupon removed him from the train. There was testimony that the conductor did not assume the direction of the arrest, but simply acquiesced in what the policemen did. It turned out that plaintiff was not the person intended by the telegram. It was held that the case was for the jury.³

If a passenger is wrongfully ejected from a street car his right of recovery is unquestioned, in view of the trespass upon his rights, even if no personal injury is suffered. Where the question of a wrongful ejection is one of fact, the question of

² *Fredericks v. Northern Cent. R. R.*, 157 Pa. 103 (1893.)

³ *Duggan v. Baltimore & Ohio R. R.*, 159 Pa. 248 (1893.)

the wrongful ejection and of reasonable compensation is for the jury.⁴

Municipal Regulation of Rates.

101. An ordinance limiting the rate of fare to be charged for a single continuous ride over the entire line to a maximum which "shall not exceed the present fare" does not diminish the amount collectible but prevents a subsequent increase of the rate.

Under such ordinance a passenger may not enter a car and make a continuous round trip over a given route for one fare. If after passing the usual terminus where the return trip commences a passenger refuses to pay another fare he may be ejected from the car.⁵

Tender of \$5 Bill.

102. Street railway companies may make reasonable regulations upon the subject of fares and may refuse to carry passengers who will not comply with them. The reasonableness of a tender of money in excess of the fare is a question of law to be determined by the court. Thus the tender of a five dollar bill for a five cent fare is unreasonable and the conductor is not bound to accept it and give back the change. Rice, J., said: "As the learned judge said, the question is a new one and we know of no Pennsylvania case ruling it. But this view was taken in a very well considered New York case where, after showing that the question of the reasonableness of the tender upon an agreed state of facts was one of law, the court said: 'When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars it did all that could reasonably be expected of it, in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons and greatly impede the rapid collection of fares:' Barber v. Central Park N. & E. R. R. Co., 151

⁴ Light v. Harrisburg & Mechanicsburg Elec. Ry. Co., 4 Super. Ct. 427 (1897.)

⁵ Wimmer v. Union Trac. Co., 12 Super. Ct. 467 (1900.)

N. Y. (1896) 237. See also *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428, cited in 35 L. R. A. 489, note. The only case holding differently that has come to our notice is *Barrett v. Market St. R. Co.*, 81 Cal. 296, 6 L. R. A. 336. There the court held that a tender of a five dollar gold piece was reasonable, but called attention to the well known fact as having some bearing upon the question that the five dollar gold piece is practically the lowest gold coin in use in that section of the country." ⁶

Tickets for Connecting Lines.

103. A local freight agent has no power to bind a railroad company by a contract for transportation beyond the terminus of the road, unless such authority has been specifically conferred upon him by the company; nor can authority be implied from previous acts and conduct. It is doubtful whether a ticket agent has the right to sell or issue a ticket of an entirely different character, or make any contract in reference to transportation different from the usual one, without special authority.⁷

In the case of connecting carriers in the absence of any special contract, each carrier is only bound to transport safely over its own route and deliver safely to the next succeeding carrier. Any carrier may agree that over the whole route the liability shall extend, but in the absence of a special contract to that effect such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.⁸

Mileage Tickets.

104. A passenger, owner of an exchange mileage ticket, cannot recover in trespass for an ejection from a train where he presented the mileage ticket alone without the necessary exchange ticket called for by the contract. Nor does the negli-

⁶ *Muldowney v. Pittsburg & Birmingham Trac. Co.*, 8 Super. Ct. 335 (1898); 29 Pitts. 158 (1898.)

⁷ *Wolfe v. Lehigh Valley R. R. Co.*, 13 York 27 (1899); 9 Kulp 401 (1899.)

⁸ *Wolfe v. Lehigh Valley R. R. Co.*, 13 York 27 (1899); 9 Kulp 401 (1899.)

gent delay in furnishing the exchange ticket enlarge the contract or change its terms. Thus, plaintiff purchased at the office of the Pennsylvania Company at Wellsville, Ohio, an interchangeable 1000-mile rebate exchange ticket issued by the Central Passenger Association, which was exchangeable for tickets over the lines of the companies designated in the contract, one of which was the defendant company. One of the covenants in the interchangeable mileage book which was signed by the plaintiff was, "This ticket must be presented to conductor with the exchange ticket received from the ticket agent. An exchange ticket will not be accepted for passage unless it is accompanied by the mileage ticket upon which it was issued." The plaintiff on January 11, 1898, while at Collier Station, on the line of the defendant company, presented his Central Passenger Association interchangeable mileage ticket to the ticket agent, surrendered the necessary number of coupons and obtained an exchange ticket westward to New Cumberland Junction, intending to take an express train eastward from that place, which did not stop at Collier Station. The train upon which the plaintiff arrived at New Cumberland Junction was due there one minute after the express which plaintiff intended to take would have arrived if it had been on time, but the express train was behind time and did not arrive until a few minutes later. Plaintiff testified that he immediately went to the ticket office and found the ticket window open but no person inside the office. He then went to the door and saw several men on the platform and returned to the window of the ticket office. After standing there some time the ticket agent came in and thereupon plaintiff tendered his mileage book and demanded an exchange ticket, but the ticket agent failed to supply an exchange ticket to plaintiff, saying that he did not have time. Plaintiff got on the train without a ticket, and when the conductor came to plaintiff, the plaintiff presented his interchangeable mileage book. The conductor refused to accept the mileage book and demanded that plaintiff pay his fare, which plaintiff refused to do, whereupon plaintiff was ejected from the train. It was held that the condition "that the mileage book would not be accepted without the ex-

change ticket" was a reasonable and proper regulation and plaintiff was not allowed to recover.⁹

Negligent delay in furnishing an exchange ticket called for by a mileage ticket does not enlarge the contract or change its terms. If there is a breach of such a contract, suit must be on the contract and the damages measured by the usual rule based on the results of such delay. Damages, however, cannot be inflated at will by the party injured illegally boarding a train and inviting an ejection therefrom. The passenger in such a case could either buy a general passenger's ticket, or pay his fare on the train, in either of which case his measure of damages would be the additional outlay in making the journey in this way.¹⁰

Excursion Tickets.

105. A "special excursion ticket" had a notice printed in large letters on its face as follows: "Notice to purchaser. Read the above contract carefully—it is important—and take notice that the contract must be stamped at Chicago, Ill., before ticket will be accepted for return trip." It was held that the condition was not unreasonable, and the fact that a gateman permitted the passenger to enter a train without examining and punching the ticket, and that the conductor of a sleeping car failed to notice that the ticket was unstamped, was not evidence of a waiver of the condition by the company.¹¹

Where a passenger buys and accepts from a railroad company a reduced rate excursion ticket, on which was stamped among other conditions that "The person accepting and using this ticket thereby assumes all risk of accident and damage to person or property," the passenger thereby agrees by the acceptance of the ticket to waive the common law rule making the carrier an insurer of his safety, and he cannot avail himself in case of injury of the presumption of negligence which arises

⁹ *Robb v. Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.*, 14 Super. Ct. 282 (1900.)

¹⁰ *Robb v. Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.*, 14 Super. Ct. 282 (1900.)

¹¹ *Bowers v. Pittsburgh, Fort Wayne & Chicago R. R.*, 158 Pa. 302 (1893.)

in favor of the passenger where there has been an injury in the means of transportation. The burden of proof in such a case is on the passenger to prove negligence on the part of the carrier, but this rule, however, does not apply to cases where the only inference to be drawn from the accident itself is that the carrier had been negligent.¹²

Plaintiff about ten o'clock at night while under the influence of liquor got upon a car of the defendant company at Harrisburg, intending to go to his home in Middletown. He had a special excursion ticket, consisting of three severable portions, one covering the distance to Steelton to Highspire and one from Highspire to Middletown. The first coupon was detached by the conductor. After leaving Steelton (the second stage of the journey) the plaintiff was asked several times by the conductor for his ticket or fare. The conductor testified that the plaintiff refused to comply with his request. Other witnesses testified that the plaintiff was stupid with drink and sleep and paid no attention to the conductor's request, although not consciously refusing to produce and surrender the ticket, and that thereupon the conductor stopped the car and ejected the plaintiff. It was held that a verdict and judgment for plaintiff for the wrongful ejection for \$445.17 would be sustained.¹³

Tickets Bought from Scalpers.

106. The Act of May 6, 1863, P. L. 582, to prevent fraud on travelers is within the police power of the State and is constitutional. On behalf of defendant who was convicted under the Act of May 6, 1863, of buying and selling railroad tickets it was contended that the Act was unconstitutional. Porter, J., said: "Acts substantially the same in provision have been adopted in other States. In all the adjudicated cases save one the Acts have been declared constitutional and their provisions upheld. All of the reported cases have been collected and examined by us in which the question here involved has been considered and are as follows: *Com. v. Wilson*, 14 Phila. 384 (1880); *Fry v. The State*, 63 Indiana, 552 (1878); *State v.*

¹² *Crary v. Lehigh Valley R. R. Co.*, 203 Pa. 525 (1902.)

¹³ *Clark v. Harrisburg Traction Co.*, 20 Super. Ct. 76 (1902.)

Corbett, 57 Minnesota 345 (1894); *Burdick v. People*, 149 Illinois, 600 (1894); *The People v. The Warden of the Prison*, 157 N. Y. 116 (1898); *Jannin v. The State*, 51 S. W. Rep. 1126 (Texas, 1899); *Nashville, etc. R. R. v. McConnell*, 82 Fed. Rep. 65 (C. C. Tennessee, 1897). And see *State v. Bernheim*, 49 Pacific Rep. 441 (Montana, 1897). All of these cases are in substantial accord. The case of *The People v. The Warden of the Prison*, *supra*, being the exception. The Act does not impair 'the obligation of contracts,' since the contracts alleged to be affected by the Act had no existence until nearly forty years after its passage. The Act does not violate the constitutional provision respecting interstate commerce. It is not an attempt to make a rule affecting interstate commerce. It is a police regulation affecting the person and conduct of those attempting to do certain acts which have been forbidden under penalty. The Act of 1863 does not abridge any privilege or right secured to citizens either by the Constitution of the United States or by that of the Commonwealth. It does not deprive the holder of a railroad ticket of the unused portion of it. It regulates the sale and requires the company issuing to buy. The purchaser of a railroad ticket takes it subject to such reasonable restrictions as the law may impose upon the public business of the carrier. The purpose of the Act is to prevent fraud. It is recited in the preamble that 'whereas numerous frauds have been practiced upon unsuspecting travelers by means of the sale by unauthorized persons of railway and other tickets' the appellant is not in the position of one innocently selling an unused portion of a ticket bought in good faith. He is confessedly conducting a business at which the Act of Assembly directly strikes. The appellant is not deprived of any property of which he is honestly the owner, nor is he prevented from prosecuting a business of a kind recognized by the law as respectable. The privileges and immunities protected by the Constitution are subject to such restraints as the Government may prescribe for the general good of the whole people. The appellant has, therefore, no right to complain of the restriction put upon his business which has been stigmatized as conducive to fraudulent acts and practices."¹⁴

¹⁴ *Com. v. Keary*, 14 Super. Ct. 583 (1900.) The Supreme Court, 198 Pa. 500 (1901) unhesitatingly sustained Judge Porter's opinion.

Free Pass.

107. A free pass given in New Jersey for transportation from a point in Pennsylvania to a point in New York, and containing a provision relieving the railroad company from liability in consideration of free transportation, is not governed by the law of New Jersey which upholds such a contract even against the company's negligence, but is governed by the law of Pennsylvania which prevents a railroad company from relieving itself of responsibility for its own negligence.¹⁵

A drover whose transportation is included in the price paid for the transportation of live stock which the drover accompanies is a passenger in the sense of one who has paid his fare and also within the meaning of the Act of April 4, 1868, P. L. 58. A release signed by such drover does not relieve the railroad company from its own negligence. It, however, puts upon the drover the burden of proving negligence. This burden is sustained by proof that his injuries resulted from the violent collision between the car in which he was riding and another car on the company's track.¹⁶

¹⁵ *Burnett v. Pennsylvania R. R.*, 176 Pa. 45 (1896.)

¹⁶ *Rowdin v. Penna. R. R.*, 208 Pa. 623 (1904.) In this case Justice Mestrezat distinguished between the position of a drover and a postal clerk as follows: "The cases cited and relied upon by the defendant wherein a postal clerk was held not to be a passenger and within the provisions of the Act of 1868, are clearly distinguishable from the case at bar. A postal clerk is carried by a railroad company by virtue of the Act of Congress, which provides that the company shall carry him without extra charge. Neither he nor his employer, the United States Government, contracts with the company for his transportation. As said by Paxson, J., in *Pennsylvania Railroad Company v. Price*, 96 Pa. 256: 'This Act (of Congress) makes it the duty of the company to carry the mail agent without extra charge, but it no more makes him a passenger than it does the mail matter of which he has the care. The company have no control of him as they have over passengers, for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers.' In this case the court in commenting on *Pennsylvania Railroad v. Henderson*, 51 Pa. 315, and noting the distinction between a mail agent and a person traveling with stock by virtue of a contract with the railroad company, says: 'There the plaintiff was a drover transporting his live stock upon the cars of the company. He had paid the freight on his stock, and at the same time received a pass for himself. He was traveling with his stock, and was as much a passenger as if he had been traveling with his

Street Railway Transfers.

108. Plaintiff was a passenger on the line of a street railway company which runs east on Green street to Fourth street, then down Fourth street to Dickinson up to Eighth, thence to Fairmount avenue and west on that street. He purchased an exchange ticket, paying therefor eight cents. Plaintiff alighted from the car when on its trip eastward it had reached and turned south on Fourth street at Green street and went down Green street to Third street and there boarded a car going up Third street in a direction opposite and parallel to the course of the car he had just left. He presented the exchange ticket to the conductor of the Third street car who refused to accept it. The exchange ticket read on its face that the purchaser would be carried from the junction of the road issuing the ticket over certain other roads, but among those roads the Second and Third street road or division was not mentioned. The plaintiff refused to pay his fare whereupon the conductor ejected him from the car.

Plaintiff offered to prove: (a) That when he tendered eight cents to the conductor on the Green street car he asked for an exchange ticket to go up Third street. (b) That the conductor assured him that the ticket he sold him was good up Third street. (c) That similar tickets had been sold by other conductors on the Green street line. (d) That in fact other conductors on the Third street line had before the time referred to and since accepted similar tickets for passage up Third street.

Defendant objected to this evidence and was sustained by the court, Beitler, J., saying: "It is well to bear in mind that the

trunk. He had a direct contract relation with the company. He was under the control of the conductor, and was bound to conform to the reasonable rules of the company the same as other passengers. I see little analogy between such a case and that of a mail agent, who has no contract relation with the company, and who is not in any sense under its control.' Nor does *Miller v. Cornwall Railroad Company*, 154 Pa. 473, rule the case in hand against the plaintiff. There the plaintiff was injured while he was in charge of the cars of his employer which were run over the defendant's road, under a traffic agreement between the parties. He was clearly 'engaged or employed on or about the road' of the defendant company in contemplation of the Act of 1868."

issuance of exchange tickets is not required by law. It is a gratuity on the part of our street railways. The duties of a conductor are primarily to look after the running of the car. The least of his duties in importance to the public and in the time consumed is to collect fares. He collects from every passenger a fare of five cents, a transfer check or an exchange ticket. He sells to any passenger desiring it an exchange ticket for eight cents. He has but one kind of ticket to sell. He is not a ticket agent giving the other party a selection of routes, of trains, of duration of ticket, of straight tickets or excursion tickets, of tickets good on regular trains, or limited trains, of mileage or monthly or quarterly or school or workmen or family tickets. He has one fare to collect, no matter how long or how short the ride. He has one exchange ticket to sell. His price therefor is always and invariably eight cents. It would seem, therefore, that there is not from the nature and extent of his usual employment to be deduced the authority in him to make contracts of carriage on behalf of the company employing him as a conductor. The quotation from *Story on Agency* and the case of *Hunes v. Herr*, 39 W. N. 568, would seem to warrant the conclusion from the facts given that the conductor of a street passenger railway car stands in the same position to his employer as an agent whose assurances when selling a ticket bind his employer as does the ticket agent of a steam railroad company. The conductor has duties devolving upon him so important to the pedestrians and travelers upon the street and to the passengers getting on and off the cars, that he should be detained as short a time as possible within the car collecting fares and safety for the public as well as for the company would seem to demand imperatively that the passenger should pay his fare or tender a ticket good on its face. There was no offer made by the plaintiff to prove that tickets similar to that held by the plaintiff were received by the Third street conductor with the knowledge or by the authority of the defendant company. An entire violation of the company's rules by its servants cannot suspend the rule. The rule to take off the non-suit is discharged." ¹⁷

17 *Anderson v. Union Trac. Co.*, 7 Dist. 41 (1897); 4 Lacka. 6 (1897.)

Where a transfer ticket issued by a street railway company is given to a passenger immediately before entering a car, and it appears that the ticket was punched in two places for time, one for the correct hour and another for a time two hours earlier, and the conductor of the car refuses to accept the ticket on the ground that it was two hours old, notwithstanding the assertion of the passenger to the contrary, and the passenger is ejected, he is entitled to substantial damages for the inexcusable trespass.¹⁸

¹⁸ *Laird v. Pittsburgh Traction Co.*, 166 Pa. 4 (1895); 25 Pitts. 291 (1895.)

CHAPTER XVII.

CARRIERS OF GOODS.

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| 109. Limitation of Liability. | 115. Notice to Consignee. |
| 110. Delivery. | 116. Measure of Damages. |
| 111. Delivery to Wrong Person. | 117. Burden of Proof. |
| 112. Delivery by Express Companies. | 118. Duties as Forwarders. |
| 113. Connecting Carriers. | 119. Bills of Lading. |
| 114. Seizure of Goods by Legal Process. | 120. Demurrage. |
| | 121. Insurance. |
| | 122. Who May Maintain Suit. |

Limitation of Liability.

109. A common carrier cannot contract against the consequences of his own negligence or fraud.

Thus a clause in the bill of lading is void which stipulates that the owner, shipper and consignee shall cause the goods to be "fully and sufficiently insured from loss or damage by fire and, in the event of such loss or damage, that they will look for compensation or reimbursement therefor only to the said insurance; but if such loss or damage shall occur from any cause which shall be held to render this line or any of its agents liable therefor (which is hereby declared to be contrary to the intentions of the parties thereto), it is hereby further expressly agreed that this line shall have the benefit of such insurance, and the owner, shipper and consignee severally agree that it shall be so inserted in the policy of insurance." In such a case if the owner fails to insure, and the goods are lost through the negligence of the carrier, the latter is liable.¹

The carrier may limit its liability to its own line although the point of destination mentioned in the bill of lading is beyond the terminus of the carrier.

A bill of lading for a carload of horses mentioned Frank-

¹ Willock v. Pennsylvania R. R., 166 Pa. 184 (1895); 25 Pitts. 349 (1895.)

ford, Philadelphia, as the destination of the car. The defendant's railroad terminated at a point in Philadelphia some miles from Frankford, which was a suburban town. When the horses arrived at the terminus in Philadelphia a delivery of them was tendered to the agent of the consignee, and upon his request the car was delivered to another railroad company to be taken to Frankford. The written contract of shipment was to carry the horses "to the freight station, Phila., Pa., ready to be delivered to the consignee or his order, or to such company or carrier (if the same is to be forwarded beyond such station) whose line may be considered a part of the route to the destination of said stock," and it provided that the responsibility of the defendant as a carrier should cease at the freight station where delivery was made, or ready to be made, to the consignee, owner or carrier. The horses were injured on their way from the freight station in Philadelphia to Frankford. It was held that the liability of the carrier ceased when the horses were tendered to the plaintiff's agent, and from that time on its responsibility was that of a forwarder only. In this case a claim was made that there had been a modification of the agreement so as to extend the liability beyond Philadelphia. It was held that the burden was on the plaintiff to show the existence of such an agreement.²

There can be no recovery for the loss of a diamond ring where plaintiff received from an express company a receipt which limited the liability of the company in the absence of an express contract and provided further that notice of loss should be made within 60 days, where plaintiff delivered to the company a diamond ring valued at \$72, and declined to state the value of the package which contained the ring concealed in the folds of a piece of cloth, and for which he paid the ordinary express rate, and failed in addition to give the sixty days' notice required.³

The common law liability of a common carrier may be modified by usage or custom. Accordingly where a custom existed among the railroads of the country for consignees of goods at

² *Keller v. Baltimore & Ohio R. R.*, 174 Pa. 62 (1896.)

³ *Edelsohn v. United States Express Co.*, 4 Lacka. J. 61 (1903); 16 York 201 (1903.)

small stations where there is no warehouse or freight agent to look out for the arrival of goods and take charge of their parcels when they are set down from the train the carriers are relieved from all responsibility as to the goods carried after their arrival at the station and they are then at the risk of the consignee.⁴

Delivery.

110. If a common carrier attempts to deliver goods to a consignee and fails, and then gives notice to the consignor that the goods would be held at his risk, their liability as common carriers ceases and they become liable only as warehousemen. But in such a case if it appears that the goods could be neither produced nor accounted for, the implication of negligence rests upon the carrier as warehouseman and the consignor may recover the value of the goods.⁵

It is essential to the establishment of liability as a common carrier for the loss of goods to show delivery to the carrier at a customary place, during the usual business hours and to an authorized agent. A delivery to a railroad warehouse about dark and after it was closed and locked for the night by plaintiff's agent, by opening the upper door and putting the goods in, there being no one in charge, does not show such delivery as will charge defendants as a common carrier nor as a warehouseman without affirmative proof of some act of negligence on the part of defendant.⁶

Delivery to Wrong Person.

111. Where a railroad company has negligently permitted the wrong person to take goods from its station, and it appears that the goods had been consigned by the shippers to themselves but for delivery to a purchaser and it also appears that the purchaser had paid for the goods partly in advance and partly by lifting a draft attached to the bill of lading, the railroad company after settling for the loss with the purchaser,

4 *Allam v. Pennsylvania R. R.*, 183 Pa. 174 (1897), reversing 3 Super. Ct. 335 (1897); 18 Pa. C. C. R. 65 (1896); 5 Dist. 54 (1896.)

5 *Koch v. National Express Co.*, 1 Lacka. 289 (1895.)

6 *Spofford v. Pennsylvania R. R.*, 11 Super. Ct. 97 (1899.)

may take an assignment of his claim and use his name in a suit for the company's use against the person who had wrongfully taken the goods.⁷

A shipping receipt provided that: "The acceptance of this receipt for goods made subject to the provisions of the bill of lading of this company makes this an agreement between the Merchants Despatch Transportation Company and the carriers engaged in transporting said goods and all parties interested in the property."

Suit was brought by plaintiffs against the Merchants Transportation Company for alleged mis-delivery of goods which were consigned to Robinson, of Tyler, Texas, and which were delivered to Michell & Co., at Dallas, Texas.

It was held that the bill of lading furnished by the defendant to the plaintiff should be received in evidence and that the facts relating to the delivery of the goods by the defendant to the consignee should be submitted to the jury.⁸

A common carrier cannot be charged with negligence in the delivery of goods where it appears that the carrier company delivered the goods to the man to whom they were sent, and whom the company was induced by the acts of the shipper in dealing with him (by sending to him the bill of lading) to believe was the man to whom the shipper intended to send them.⁹

Delivery by Express Companies.

112. When a shipment arrives at its destination and inability to deliver arises from lawful cause, it is not the law that the carrier is bound promptly to redeliver the shipment to the consignor and cannot set up any excuse for its failure to do so. An express company is bound to use due and reasonable diligence in the care and delivery of an article intrusted to it, but if the consignor for its own reasons, sees fit not to put his name or address on the package, and in spite of diligent inquiry the carrier is unable to discover who the consignor is, the court

⁷ *Breisch v. Leitzel*, 22 Super. Ct. 25 (1903.)

⁸ *Goodman v. Merchants Despatch Transportation Co.*, 3 Super. Ct. 282 (1897); *Goodman v. Merchants Despatch Transportation Company*, 6 Super. Ct. 168 (1897.)

⁹ *Seibert v. Philadelphia & Reading Ry.*, 15 Super. Ct. 435 (1900.)

cannot declare as a matter of law that the failure promptly to notify him is negligence.¹⁰

Connecting Carriers.

113. Where goods were destined to a point beyond the carrier's line, and the contract provided that there should be no liability for damage not occurring on its own road, the first carrier is not liable for acts done by the second carrier after delivery of the goods to the second carrier.¹¹

A common carrier is bound to exercise reasonable diligence in forwarding freight, having regard to its character and his facilities for transportation. The fact that a connecting carrier to whom it is to be transferred may be unprepared to continue the transportation with due promptness, will not excuse a neglect to observe such diligence. The obligation of the first carrier is in no sense contingent on the readiness or liability of the second to act in the premises. It is for him to discharge his own obligation, as it arises and he cannot be relieved from default therein by any default of the other.¹²

In *Hughes v. Pennsylvania R. R. Co.*,¹³ a contract which was made in New York for the transportation of a valuable horse to a point in Pennsylvania contained a stipulation that the liability of the initial carrier and any connecting carrier should be limited to an amount not exceeding one hundred dollars. The court held that the limitation, although good in New York, would not be sustained in favor of a connecting carrier in Pennsylvania upon whose line the horse was injured. Potter, J., said: "Where a contract containing a stipulation limiting liability for negligence is made in one State, but with a view to its performance by transportation through or into one or more States, it should be construed in accordance with the law of the State where its negligent breach causing injury occurs. If such a contract comes under construction in this State, whose policy prohibits such exemption and the injury has taken place

10 *Walsh v. Adams Express Co.*, 15 Super. Ct. 292 (1900.)

11 *Seibert v. Philadelphia & Reading Ry.*, 15 Super. Ct. 435 (1900.)

12 *Alexander v. Pennsylvania R. R.*, 7 Super. Ct. 183 (1898.)

13 202 Pa. 222 (1902.)

within the limits of the State the contract will be declared null and void.

A bill of lading contained a clause that "no carrier shall be liable for loss or damage not occurring on its own road," accordingly where it was shown that it was the custom of two railroad companies in the transfer of freight at a connecting point to place the cars containing the freight upon a certain track during the night and to check the freight jointly the next morning before delivery to the connecting carrier, the connecting carrier cannot be held responsible for a loss discovered in the morning when the joint checking of the freight in the cars took place and which occurred after the car containing the freight was placed upon the proper track and before delivery of the freight to the connecting carrier.¹⁴

Railroads that are not parallel and competing may enter into a traffic agreement by which goods are shipped from one road to another without rebilling, through coupon tickets sold to passengers and trains run in close connection.¹⁵

Seizure of Goods by Legal Process.

114. Where the parties to a transfer of a bill of lading know that the property has, prior to the transfer, been by legal process taken from the possession of the carrier, the indorsement and delivery of the bill of lading does not operate as a transfer of the possession of the property.

A contractor agreed to sell nineteen flat cars and to deliver them at a designated point, further agreeing to put the cars at his expense in such shape that they would be accepted by a railroad company for shipment. The vendor procured a bill of lading for the nineteen cars made to the order of himself, "notify consignee," named, who were the vendees. The bill of lading was duly indorsed and was attached to a draft and mailed to the consignees. Subsequently the railroad company notified the contractor that four of the cars were not in a condition to be accepted. The contractor thereupon paid the company money for the repair of the cars and they were sent to the

¹⁴ *Adler v. Pittsburg & Western Ry. Co.*, 29 Pitts. 409 (1899.)

¹⁵ *Cumberland Valley R. R. v. Gettysburg & Harrisburg Ry.*, 177 Pa. 519 (1896.)

repair yard while the other fifteen cars were forwarded in accordance with the terms of the bill of lading. Before the repair of the four cars were finished they were levied upon by the sheriff as the property of the contractor. When the fifteen cars reached their destination the consignees were informed of the execution levied upon the four cars and they thereupon entered into an agreement with the contractor by which they accepted the fifteen cars and paid a portion of the draft, and agreed to pay the balance when the four cars were delivered; it was held that the consignees named in the draft had no title to the four cars as against the plaintiff in the execution.¹⁶

Bills of lading are symbols of property and when properly indorsed and delivered operate as a constructive delivery of the property itself which serves all the purposes of an actual possession. When according to the terms of the bill of lading the property is to be delivered to the order of the consignor the carrier becomes the agent of the consignor for the purposes of transportation and the possession of the agent is the possession of the consignor. When the consignor indorses and delivers the bill to another it works a constructive transmutation of possession and the carrier who was agent for the consignor becomes the agent of his indorsee. There must, however, be an actual possession of the property in the agent in order to sustain a symbolic delivery by the principal.¹⁷

Where goods consigned to a consignee were uncalled for and the carrier stores them in its warehouse, where they were levied upon as the property of the consignee and while subject to such levy part of the goods were stolen, the consignor upon demand of the goods, upon proof of ownership, can only recover the goods which the carrier refused to deliver to the consignor on the demand made after the theft.¹⁸

Notice to Consignee.

115. Although as a general rule a common carrier must give notice of the arrival of goods to the consignee still he may modify his liability so far as to provide that notice of the ar-

16 *Storey v. Hershey*, 19 Super. Ct. 485 (1902.)

17 *Storey v. Hershey* 19 Super. Ct. 485 (1902.)

18 *Frank Bros. v. Central R. R. of New Jersey*, 9 Super. Ct. 129 (1898.)

rival of goods need not be given at small stations where there is no station house or freight agent, and therefore a contract that goods at such stations shall be at the risk of the owner until loaded into cars or when unloaded therefrom is not against public policy and will be enforced.

An action was brought to recover \$627 damages to lumber shipped by plaintiff to Strafford Station, which it was alleged was found lying beside the railroad at Strafford Station in a damaged condition. The goods were delivered in two carloads. Strafford Station is what is known as a prepaid freight station—that is, a freight station at which there is no freight agent or warehouse. Upon shipments made to such stations all freight must be collected in advance. The two bills of lading in this case were issued by railways connected with the Pennsylvania Railroad, the freight charges were prepaid, and the freight was delivered to the defendant at the point of connection of the two railways. The bill of lading for the first carload contained the following condition:

“Property destined to or taken from a station at which there is no regularly appointed agent shall be entirely at risk of owner when unloaded from cars or until loaded in cars.”

The bill of lading for the second carload contained the following condition:

“Where there are no regularly appointed freight agents the merchandise shall be at the risk of the owner until loaded into the cars, and when unloaded therefrom and when received from or delivered on private turnouts it shall be at the owner’s risk until cars are attached to and after they are detached from the trains.”

The defendant offered evidence as to a custom on all railroads to establish a prepaid freight station where there is no freight agent or warehouse, and that it is the custom, as set out in the bill of lading, to discharge the carriers from all responsibility as to the goods carried after their arrival at the station and that they are at the risk of the owner after delivery at the station.

The Superior Court affirmed a verdict for plaintiff rendered in the lower court, but on appeal to the Supreme Court, in reversing the judgment of the lower and Superior Court, Wil-

liams, J., said: "The special contract relied on in this case does not stipulate for relief from the consequences of the negligence or fraud of the carrier. It recognizes the existence of circumstances that make it practically impossible for the carrier to discharge all the common law duties of a carrier at Strafford, and that induce him to refuse freight to that station except upon special terms. It agrees in view of these circumstances to accept such service as the carrier can render, viz: the simple transportation of the goods, and to supply what the carrier is not prepared to supply, the care and protection of the goods when they reach the platform. The contract limits the liability of the company to what it undertakes to do and relieves it of responsibility for all that lies beyond the mere transportation and setting down of the goods. It is asserted that the goods were unloaded during a storm and were not protected by the carrier from the weather. By the contract the consignor was to look after the goods on their arrival. It was his business to provide the shelter. He knew the company had none. He had agreed to take the risk of caring for them. When the accommodation train came that morning at the usual hour for its arrival the consignee was not at the platform. His foreman was not there, although he was expecting the goods and had notice from the consignor of their shipment. What should be done? The contract of the carrier had been performed and he had the right to unload the goods. He could not carry them to some station where he had a safe place for storage and leave them there, for Strafford was the point of destination. And the carrier can neither deliver goods at a wrong place or to a wrong person without liability to the owner. If the goods had filled the car the car might have been left with the goods in it, but the goods did not fill the car. It contained other goods to be delivered to other persons and at other places. The only way of preserving the goods from the weather would have been to hold the train until the rain was over before unloading the goods, but this was clearly impracticable. The alternative was to unload the goods and leave the consignee to attend to them as the shipper had agreed should be done. This the carrier did, and we see no negligence in his so doing. He did all he agreed to do, all he was em-

ployed to do, all he had the power to do. The complaint really is, that he delivered the goods at the proper point of destination in exact compliance with his undertaking. If after they were put off at the station they were damaged by being left in the rain, the consignee and his agent who came a half hour too late to the platform must take the consequences of the risk assumed when the carriage of the goods was contracted for."¹⁹

Measure of Damages.

116. Where goods are lost by a common carrier, the measure of damages is the value of the goods at the point of destination, and the carrier cannot relieve itself of the operation of this rule by a stipulation in the bill of lading that "the amount of any loss or damage shall be computed at the value of the property, at the place and time of shipment;" nor is it relieved from the rule by the fact that the point of destination is not on its own line, where it appears that it accepted the goods for transportation safely, on a through rate to the point of destination.²⁰

Where a bill of lading for perishable goods exempted the carrier from loss "by any of the causes incident to transportation such as chafing, heating, freezing, leakage . . . or any other reason not directly traceable to the negligence of its servants," and the goods were injured from the excessive heat of a closed box car, which they only partly filled, the carrier is not liable where the evidence showed that there was no

¹⁹ *Allam v. Pennsylvania R. R.*, 183 Pa. 174 (1897), reversing s. c. 3 Super. Ct. 335 (1897); 18 Pa. C. C. R. 65 (1896); 5 Dist. 54 (1896.)

²⁰ In *Ruppel v. Allegheny Valley Ry. Co.*, 167 Pa. 166 (1895); 25 Pitts. 403 (1895), it appeared that plaintiff had ordered a carload of potatoes which had been consigned to him at Pittsburgh from New Orleans to be transferred to defendant's road for shipment to Buffalo. The car was six days on the way from New Orleans to Pittsburgh and five days from Pittsburgh to Buffalo. When the potatoes arrived at Buffalo they were much decayed. The car was not inspected at Pittsburgh, and the evidence showed that it was delayed about three days en route to Buffalo, on account of its being out of repair. There was also evidence of experienced dealers that the decay in the potatoes had commenced within three days prior to their arrival at Buffalo. It was held that there was sufficient evidence of negligence on the part of the defendant and of consequent loss to plaintiff to submit the case to the jury.

agreement to place the goods in a ventilated car although one of the carrier's clerks was directed to place them in such a car, and it also appeared that there was no custom to carry such goods when less than a carload, in ventilated cars. In such a case, as there was no evidence of delay, accident or lack of care during the transportation, the burden of proof is upon the plaintiff to prove negligence on the part of the railroad company. It is not sufficient in order to sustain a verdict that plaintiff prove that the fruit became rotten before it was delivered at its destination. He must prove a failure to forward with reasonable dispatch or other facts, justifying a finding of negligence, and that the negligence caused the damage.²¹

Burden of Proof.

117. Where in an action to recover the value of seven hogs plaintiff testified that he shipped eighty-two hogs and that only seventy-five were delivered to the consignee and then rests, and it appears that the hogs were shipped at a special rate under a special contract wherein plaintiff undertook to take care of the hogs while in transit, the burden of proof is on plaintiff to show negligence and binding instructions for defendant were proper.

In such a case evidence that it was customary for the railroad company to ship hogs without any person accompanying and that for many years it had accepted hogs from plaintiff without requiring him to accompany them is not admissible; neither is evidence of a usage contradicting the express terms of a contract admissible.²²

A consignment of goods which included two barrels of molasses was carried by the defendant company from Scranton to Carbondale. The freight handler for the defendant company trucked one of these barrels from the D., L. & W. car across the platform to the gravity car. As he deposited it in the gravity car he noticed that the molasses was leaking, and before he could get the barrel down on its side the entire head

²¹ Davenport Co. v. Pennsylvania R. R., 10 Super. Ct. 47 (1899); Davenport Co. v. Pennsylvania R. R., 173 Pa. 398 (1896.)

²² Needy v. Western Maryland R. R., 22 Super. Ct. 489 (1903.)

came out and the molasses escaped. There was evidence tending to show that the molasses in the barrel and on the floor of the car was covered with a white foam and in a state of fermentation. The empty barrel was shipped on to Honesdale, but plaintiffs refused to receive it and brought suit to recover the value of the goods. The shipping receipt contained a stipulation that the carrier would not be liable for loss caused by leakage or breakage. It was held that the case was for the jury. The court said: "The loss here sustained was in no sense due to leakage; by this term is to be understood the gradual escape of the contents of a vessel through crevices, joints or small openings insecurely closed. The provision as to breakage covers such breakage as may occur from the ordinary incidents of transportation, but not injuries caused by the carrier's negligence. In the present case the loss resulted from the displacement of one end of the barrel while being transshipped by the carrier. Whether this occurred through inadequate means of transshipment or from want of care in effecting it were questions of fact raised by the evidence, and were for the jury to determine. We therefore cannot hold as contended that as a matter of law the carrier was released from its common law obligation by the stipulation in the shipping receipt." ²³

While injury to goods in transit is not negligence *per se*, it is evidence of negligence. Its effect may be rebutted by showing that it is due to causes beyond the scope of the carrier's obligation. It is not rebutted merely by evidence explanatory of the time, place and manner of injury. Evidence offered by way of explanation does not of itself throw on the shipper the burden of showing by positive testimony negligence on the part of the carrier. Unless an explanation undeniably adequate arises from undisputed facts it is for the jury, as judges of the credibility of the witnesses, the weight of the evidence and the measure of care demanded by the circumstances to determine whether it shall be accepted in discharge of the carrier's liability. The duty of a common carrier is to

²³ *Menner & Co. v. Delaware & Hudson Canal Co.*, 7 Super. Ct. 135 (1898.)

carry safely unless prevented by the act of God or of the public enemy. It may, however, be limited by special contract or by notice to which the law imputes contractual effect. When this defence is made the burden of proof is on the carrier.²⁴

Duties as Forwarders.

118. As to a common carrier's ability to forward freight with due diligence nothing is to be assumed; and since there is no fixed standard by which the carrier's duty is to be measured it cannot be declared as a matter of law. When, therefore, cattle have been delayed in transportation, the questions whether they were transported with reasonable dispatch and if not, whether injury arose from default in transportation, or in the mode of keeping them, while in the carrier's care, are questions for the jury.²⁵

Bills of Lading.

119. Where a bank holding a bill of lading does not notify a railroad company of the existence of a bill of lading, and permits purchasers of the goods to assume the position of consignors, and to direct the movement of the goods, the bank cannot hold the railroad company for any resulting loss.

A bank received a bill of lading made out to the order of the consignors with a draft attached drawn on the purchasers of the goods covered by the bill of lading. The bill of lading contained a direction to notify the purchasers. The latter drew a new draft upon a person to whom they proposed to sell the goods, and this draft was discounted by the bank, and the proceeds credited to the purchasers, who drew a check for the amount of the original draft and delivered the check to the bank. The person on whom the second draft was drawn failed to take the goods, and the purchasers sold them to other parties to whom they directed the railroad company to deliver the car. The purchasers never paid the second draft. The railroad company had no knowledge of the bill of lading.

²⁴ *Menner & Co. v. Delaware & Hudson Canal Co.*, 7 Super. Ct. 135 (1898.)

²⁵ *Alexander v. Pennsylvania R. R.*, 7 Super. Ct. 183 (1898.)

It was held that the railroad company was not liable to the bank for the goods.²⁶

Demurrage.

120. A railroad company has a right as a common carrier to make reasonable rules to speed the unloading of its cars.

It is a reasonable regulation of a railroad company, as a common carrier, to provide by its rules, that "a charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car."

In an action of *assumpsit* by a railroad company to recover demurrage for the detention of cars where the defendant's statement contains a complete copy of its accounts giving car initials, number, contents, exact hour of arrival, date of release, number of days detained and amount of charge, an affidavit of defence is insufficient which shows on its face that the defendant had accurate accounts of the movements of the cars and which merely avers that the detention of a large number of cars caused by reloading was embraced in the charge of delay in unloading without specifying the cars thus detained by a reloading. In such a case the defendant cannot allege as a defence to the railroad company's demand for demurrage that it had no knowledge of the regulation relating to demurrage where it appears that by defendant's own admission bills for violation of the rule had been regularly rendered for months.²⁷

Insurance.

121. Where a shipper of goods has voluntarily insured

²⁶ National Bank of Phoenixville v. Philadelphia & Reading Railway, 163 Pa. 467 (1894.)

²⁷ Pennsylvania R. R. v. Midvale Steel Co., 201 Pa. 624 (1902), reversing 9 Dist. 181 (1900.)

them, and after their loss has collected the amount of the policy, and the bill of lading contained a clause to the effect "that the carrier shall have the benefit of any insurance that may have been effected upon or on account of such goods," the carrier may deduct from the total amount of the loss the amount of insurance money which the shipper had received.

Thus a shipper of goods insured her goods with an insurance company in the sum of \$2,000 against damage to the goods while in transit. The goods were damaged while in transit and the loss fixed at \$1,700. The shipper collected from the insurance company the amount of insurance due under the policy, viz., \$809.52, and receipted for this amount as a loan to be returned to the company if the amount of the loss should be recovered from the carrier; it was held in an action by the shipper against the carrier that the question whether the payment by the insurance company was really a loan or an adjustment of the loss, was for the jury, and that a verdict obtained by deducting the amount of the insurance (\$809.52) from the total loss would be sustained.²⁸

Who May Maintain Suit.

122. Where the right of property is not divested, the consignor can maintain suit, for he is the person who has sustained the loss, if any by the negligence of the carrier.²⁹

²⁸ *Roos v. Philadelphia, Wilmington & Baltimore R. R.*, 199 Pa. 378 (1901), affirming 13 Super. Ct. 563 (1900.)

²⁹ *Turner & Co. v. Central R. R. of N. J.*, 11 Kulp 178 (1901.)

CHAPTER XVIII.

BAGGAGE.

123. What Constitutes Baggage.

124. Limitation as to Value.

What Constitutes Baggage.

123. Baggage includes such articles of necessary or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in trunks by passengers which are not designed for any such use, but for other purposes such as sale or the like, accordingly where a passenger carries with her own personal clothing, an embroidered table centre-piece of her own and a dress belonging to her mother, and the baggage is lost, there can be no recovery for either the centre-piece or dress.¹

Limitation as to Value.

124. A railroad company issued an excursion ticket in the form of a paper of some size, setting forth on its face, clearly, prominently and legibly a limitation of liability as to baggage "unless special agreement be made." It was held that the passenger in accepting the ticket will be presumed to have read it, and will be bound by the limitation, if such limitation is reasonable.²

¹ Bullard v. Delaware, Lackawanna & Western R. R., 21 Super. Ct. 583 (1902.)

² Jacobs v. Central R. R. of New Jersey, 208 Pa. 535 (1904.) In this case Justice Brown said: "Whether one who accepts a contract of carriage is conclusively presumed to have assented to its terms, and is bound by them, whether he reads them or not, as has been held by courts of high authority, is not the question now before us. It will be found discussed in *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553,* and the cases there cited. In the absence of proof to the contrary, the presumption is that the appellant read the ticket, to the character of which attention has been called. While in no one of our own cases brought to our attention by counsel for appellee, or which we have been able to find has the question of this pre-

The limitation of liability to one hundred and fifty pounds of baggage at one dollar per pound, unless a special agreement is made, is not an unreasonable one.³

sumption been passed upon, yet that it does arise seems to have been recognized in *Penna. Central R. R. Co. v. Schwarzenberger*, 45 Pa. 208. In that case the passenger purchased a ticket from Philadelphia to Cincinnati. On the face of it there was printed: 'In selling this ticket for passage over road west of Pittsburgh, the Pennsylvania Railroad Company acts only as agent for the western lines, and assumes no responsibility west of Pittsburgh.' The passenger's baggage was lost beyond Pittsburgh. There was no evidence that Schwarzenberger had read his ticket. The court, through Strong, J., in speaking of the contract between him and the railroad company, said: 'But contemporaneously with the receipt of the fare, and as evidence of the contract into which they entered, they gave to the plaintiff a ticket, informing him that they assumed no responsibility for his carriage, and of course, for the carriage of his baggage beyond Pittsburgh. They notified him that they acted only as agents for the carriers, whose route extended westward from Pittsburgh, and not at all for themselves. With this express disclaimer of personal liability, there is no possibility of implying an engagement.'

"If, then, the appellant read, as she is presumed to have done, what was printed on the face of her ticket, she knew the terms upon which she purchased it. She was distinctly notified that the baggage which the appellee would carry for her was limited to 150 pounds in weight and in value to one dollar per pound; but she was notified still further that, by special agreement with the company, its liability would not be so limited, for the limitation is followed by the words: 'Unless special agreement be made.' Without additional compensation, her baggage, limited in amount and value, would be carried; for additional compensation, by 'special agreement,' she could have it carried without the limitation imposed which had been brought to her notice and assented to by her by her acceptance of the ticket: *Crary v. Lehigh Valley R. R. Co.*, 203 Pa. 525. She did not avail herself of her right to make a special agreement by which her baggage, at its full value, would have been carried by the railroad company, and she is, therefore, bound by the reasonable limitation placed upon its liability, for it contravenes no statute, violates no duty to the public and was brought distinctly to her notice."

3 *Jacobs v. Central R. R. of New Jersey*, 208 Pa. 535 (1904.)

CHAPTER XIX.

CARRIERS OF LIVE STOCK.

125. Liability.

126. Burden of Proof.

Liability.

125. Injury to the contents of a car containing live stock may furnish ground for an inference of want of ordinary care in transportation, although there may be no direct evidence of an injurious accident to the train, or of any direct evidence of improper or negligent handling of the car. This rule, however, has no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor in cases of death from natural causes, or causes entirely unknown.

In an action to recover damages for injuries to mules shipped from Kentucky to Fleetwood, Pennsylvania, evidence was presented tending to show that the mules were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules who knew their habits and disposition, and the causes likely to lead to their injury while on board the cars, and who saw the mules in question when they were unloaded were properly allowed to express their opinion as to the cause of the injuries.¹

Burden of Proof.

126. Where in an action to recover damages for injury to

¹ Schaeffer v. Phila. & Reading R. R., 168 Pa. 209 (1895.)

live stock, the carrier claims that the stock had been shipped under a special contract limiting liability, the burden of proof as to any such limitation is upon the carrier, and unless it is admitted or clearly established by proof, the question is for the jury.²

² *Schaeffer v. Phila. & Reading R. R.*, 168 Pa. 209 (1895.)

CHAPTER XX.

RATES—DISCRIMINATION.

127. Damages.
128. Injunctions.

129. Affidavit of Defence.
130. Furnishing Cars.

Damages.

127. The treble damages recoverable under the Act of June 4, 1883, which forbids any common carrier from making any undue discrimination in furnishing facilities for transportation must be recovered in a common law action of case. Hence under the Act of May 25, 1887, trespass is the proper form of action.¹

Injunction.

128. An injunction will lie to prevent a railroad company from charging plaintiff a higher rate for transporting coal from the coal regions to Harrisburg than that charged "favored individuals, associations and corporations" for transporting coal in the same direction, a greater distance, to Philadelphia and Greenwich piers, contrary to Art. XVII, Sec. 3 of the Constitution.

Injunctions have been granted in many analogous cases in other States and in the Federal States: *Denver & N. O. R. R. Co. v. Atchison, T. & S. F. R. R. Co.*, 15 Fed. Rep, 650; *Scofield v. Lake Shore & M. S. R. R. Co.*, 23 Am. & Eng. R. R. Cases 612; *Wolverhampton Ry. Co. v. London & N. W. Ry. Co.*, L. R. 16 Eq. 433²

Affidavit of Defence.

129. No affidavit of defence is necessary under the Act of

¹ *Fishburn v. New York Central R. R.*, 12 Dist. 665 (1903.)

² *Central Iron Works v. Pennsylvania R. R. Co.*, 17 Pa. C. C. R. 651 (1895); 5 Dist. 247 (1895); 2 Dauph. 308 (1895.)

June 4, 1883, P. L. 72, in an action of *assumpsit* for unlawful discrimination in freight rates. To require such an affidavit would be to compel the defendant to furnish evidence against itself in a penal action.³

Furnishing Cars.

130. Mandamus cannot be maintained to compel a railroad company to furnish coal cars to an individual shipper. Suit should be brought at the instance of the Attorney General, so that the interest of all shippers may be fairly and equally considered.⁴

Where the line of a railroad company runs through several counties, mandamus will lie, under the Act of June 8, 1893, only in the county where the business of the corporation is principally transacted.⁵

But where a person opens and equips a coal mine on the line of an existing railroad company, and the railroad company after furnishing him cars for a certain time, refuses to continue to do so, unless he sells his coal at a rate much below the market price to a company controlled by the president of the railroad company, the person injured may in his own name and without the intervention of the Attorney General institute mandamus proceedings to compel the railroad company to furnish him cars; in such a case it is immaterial that other shippers were refused cars for the same reason.⁶

An answer in mandamus proceedings to compel a railroad company to supply plaintiff with cars for shipping coal is sufficient which alleges that the switch is so placed as to make the handling of the cars dangerous, expensive and a blockade to

3 *Moyer v. Pennsylvania R. R. Co.*, 19 Pa. C. C. R. 383 (1897); 6 Dist. 663 (1897); 15 Lanc. 62 (1897); *United Collieries Co. v. Pennsylvania R. R.*, 11 Dist. 300 (1902); 27 Pa. C. C. R. 124 (1902.)

4 *Loraine v. Pittsburg, Johnstown, Ebensburg & Eastern R. R. Co.*, 27 Pa. C. C. R. 359 (1902.)

5 *Loraine v. Pittsburg, Johnstown, Ebensburg & Eastern R. R. Co.*, 27 Pa. C. C. R. 359 (1902.)

6 *Loraine v. Pittsburg, Johnstown, Ebensburg & Eastern R. R.*, 205 Pa. 132 (1903), reversing 27 Pa. C. C. R. 359 (1902.)

traffic; that plaintiff has never been a shipper over defendant's railroad and that the railroad has not and cannot get sufficient cars to supply its regular customers.⁷

⁷ Clyde Coal Co. *v.* Pittsburg & Lake Erie R. R., 34 Pitts. 129 (1903.)

CHAPTER XXI.

NEGLIGENCE—GENERAL PRINCIPLES.

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| 131. Function of Court and Jury. | 133. Practice. |
| 132. Mutual Negligence — Joint Tort Feasors. | 134. Action of Company After Accident. |

Function of Court and Jury.

131. Negligence is the absence of care required by the circumstances. When the measure of care is fixed and unvarying and there is no question as to the circumstances it is for the court to determine whether it has been observed. But when the circumstances are in dispute, or being undoubted are such that the measure of care cannot be fixed, it is for the jury to determine its measure and from the facts as found or admitted to draw the conclusion of due care or of negligence.¹

In order to justify the court in treating the question of contributory negligence as one of law, not only the facts, but the inferences from them must be free from doubt. If there is doubt as to either the case must go to the jury.²

It is only in clear cases where neither the facts nor the inferences to be drawn from them are in doubt that the court is warranted in withdrawing the question of negligence from the jury.³

Although plaintiff's case as made out by himself, is contradicted by one of his own witnesses and by all called by the defence, the case is for the jury.⁴

The court has a right to express an opinion as to the evi-

1 *Menner & Co. v. Delaware & Hudson Canal Co.*, 7 Super. Ct. 135 (1898); *McCracken v. Consolidated Traction Co.*, 201 Pa. 378 (1902.)

2 *Conyngham v. Erie Electric Motor Co.*, 15 Super. Ct. 573 (1901); *Elston v. Delaware, Lackawanna & Western R. R.*, 196 Pa. 595 (1900.)

3 *Kroesen v. New Castle Electric Str. Ry. Co.*, 198 Pa. 26 (1901.)

4 *Todd v. Philadelphia & Reading Ry.*, 201 Pa. 558 (1902.)

dence or as to the witnesses; providing nothing is said to bind the jury or preclude them from deciding the case for themselves on the evidence.⁵

The jury are not bound to believe every story that a witness or witnesses are willing to swear to, simply because no other witness contradicts it. If its inherent improbability or irreconcilability with facts shown or admitted are such that it does not command their assent the jury may disregard it. But this rule is founded on common sense and knowledge of human nature and must be limited by the same standards. When the testimony is not in itself improbable, is not at variance with any proved or admitted facts or with ordinary experience and comes from witnesses whose candor there is no apparent ground for doubting the jury is not at liberty to indulge in a capricious disbelief. If they do so, it is the duty of the court to set the verdict aside.⁶

Plaintiff is not required to disprove negligence on his part, by negative testimony, in the first instance. If he establishes a case against the defendant without disclosing negligence on his own part he is entitled to go to the jury.⁷

When with the certainty of an infallible mathematical test applied to the testimony of a witness, he is found to be mistaken in a material matter, it would be a travesty upon justice to allow a jury to consider such testimony and a license to them to render a false instead of a true finding. Such testimony is either intentionally false or mistakenly so and in either case the court should instruct the jury to disregard it.⁸

Mutual Negligence—Joint Tort Feasors.

132. If a person sustains injuries by reason of the concurrent negligence of two railway companies, they are jointly and severally liable.⁹

5 *Simmons v. Pennsylvania R. R.*, 199 Pa. 232 (1901.)

6 *Lonzer v. Lehigh Valley R. R. Co.*, 196 Pa. 610 (1900); *Blotz v. Lehigh Valley R. R. Co.*, 11 Kulp 98 (1902.)

7 *Phillips v. Duquesne Trac. Co.*, 8 Super. Ct. 210 (1898.)

8 *Bornscheuer v. Consolidated Traction Co.*, 198 Pa. 332 (1901), affirming 30 Pitts. 344 (1900.)

9 *Rahenkamp v. United Traction Co.*, 14 Super. Ct. 635 (1900.)

A passenger in a street car was injured in a collision between a car and a railroad train. The passenger sued both the street railway company and the railroad company. The evidence tended to show that the driver of the street car did not stop, look or listen before going upon the railroad company's tracks, and that when the car was upon the tracks the gate-man of the railroad company carelessly lowered the gate and kept the car on the track without any means of escape. It was held that a verdict against both companies should be sustained.¹⁰

Where a street car and a train on a steam railroad collide, and a passenger in the street car is injured, both companies are answerable in damages to such passenger, if it appears that they were both negligent, and the passenger may maintain his suit against either.¹¹

In a suit against a city and a street railway company, to recover damages for injuries caused by a defect in the street, where the statement avers not merely the common neglect of a common duty but a neglect by the city of the duty imposed upon it, and a non-suit is entered in favor of the street railway, a verdict against the city will not be reversed.¹²

In an action against two street railway companies and a railway construction company to recover damages for the construction of a street railway without the owner's consent, for injuries to crops and fences, and for injuries resulting from the reckless operation of the cars, where it appears that one of the street railway companies had leased its franchises and property to the other and was not responsible for any of the *torts* alleged; that the other street railway company was responsible alone for the negligent operation of the road and that the construction company was responsible alone for the destruction of crops and fences, and both the construction company and the other railway company were liable for the un-

¹⁰ *Downey v. Phila. Traction Co. and Philadelphia & Reading R. R.*, 161 Pa. 588 (1894), affirming 3 Dist. 81 (1893.)

¹¹ *O'Toole v. Pittsburgh & Lake Erie R. R.*, 158 Pa. 99 (1893.)

¹² *John v. Philadelphia*, 19 Super. Ct. 277 (1902.)

lawful construction of the road without plaintiff's consent, it is error to enter a non-suit.¹³

Where a joint tort is alleged against three defendants and proved against only two, a new suit should be entered or verdict directed as to the innocent defendant, and the case submitted on the joint tort of the other two.¹⁴

In trespass all defendants are alike guilty and each is liable for the damages sustained without regard to the different degrees of guilt and when exemplary damages are claimed they should be assessed according to the acts of the least guilty, but where compensatory damages are sought for the law will not apportion the guilt or responsibility of the *tort feorsors*, but holds them all for what the most culpable ought to pay.¹⁵

A joint tort must be proved as alleged and the proof of separate torts will not warrant a recovery against any of the defendants.¹⁶

Where a passenger in alighting from a street car, as directed by the conductor, is thrown by a block of wood negligently placed across a trench which had recently been dug and filled up by a gas company, the street railway company and the gas company are not liable as joint *tort feorsors*.¹⁷

Where two or more persons act independently in producing an injury, they are not jointly liable for the combined results of their act, and the fact that it is difficult to determine the relative proportion of injury by each is not sufficient reason for holding them jointly liable.¹⁸

Where a person is injured by the obstruction of a highway with a rail it is improper to join the city with the street railway company and the contractors who were laying the tracks.

13 *Minnich v. Lancaster & Lititz Elec. Ry. Co.*, 203 Pa. 632 (1902); 19 *Lanc.* 401 (1902.)

14 *Minnich v. Lancaster & Lititz Ry. Co.*, 203 Pa. 632 (1902); 19 *Lanc.* 401 (1902.)

15 *Dennison v. Somerset & Cambria R. R.*, 21 *Super. Ct.* 248 (1902.)

16 *Howard v. Union Traction Co.*, 195 Pa. 391 (1900), affirming 9 *Dist.* 99 (1900); 23 *Pa. C. C. R.* 295 (1900.)

17 *Howard v. Union Traction Co.*, 195 Pa. 391 (1900), affirming 9 *Dist.* 99 (1900); 23 *Pa. C. C. R.* 295 (1900.)

18 *Magee v. Pennsylvania Schuylkill Valley R. R.*, 13 *Super. Ct.* 187 (1900.)

It appeared that plaintiff's husband fell over a girder rail lying in a gutter and received injuries from which he subsequently died. It was alleged in the declaration that the city of Philadelphia was liable because of its failure to keep the highway free and clear of obstruction; that the Electric Traction Company was liable because it negligently permitted a rail to be so placed as to obstruct the highway and cause the accident and that the contractors are chargeable because they acted jointly with the traction company in placing an obstruction on the highway and allowing it to remain there, thus causing the accident. The defendants were all sued as joint *tortfeasors*, under the idea of a community of interest and a concurrent responsibility. Plaintiff was allowed to recover against the traction company, as the evidence failed to show that the act complained of was joint. Potter, J., in reversing the lower court, said: "It was clearly wrong to sue the city jointly with the other defendants, because the measure of its responsibility is entirely different. Its liability is secondary and not primary. The evidence produced at the trial showed that there was no concert of action between the traction company and the other defendant, the contractors. The duty of each was distinct and of a different nature. For its own breach of duty, each was liable separately and they should not have been sued jointly. It is true that a verdict was rendered and judgment was entered against one defendant only, but we are not satisfied that this corrects the error. We are of opinion that where a plaintiff in an action of trespass to recover damages for negligence declares for a joint tort and the evidence shows no joint action by defendants, a verdict and judgment against one defendant for a separate tort should not be permitted." ¹⁹

Practice.

133. Where an action of trespass has been brought by a husband and wife in right of wife for personal injuries to her, the court may, although over two years has elapsed since the

¹⁹ *Wiest v. Electric Traction Co.*, 200 Pa. 148 (1901); *Goodman v. Coal Township*, 206 Pa. 621 (1903.)

accident, permit the action to be consolidated under the Act of May 8, 1895.²⁰

Action of Company after Accident.

134. In an action to recover damages for personal injuries at a grade crossing in the daytime, evidence that after the accident the company employed a night watchman at the crossing is irrelevant.²¹

²⁰ *Madara v. Shamokin & Mount Carmel Elec. Ry.*, 192 Pa. 542 (1899.)

²¹ *Berk v. Northern Central Railway*, 164 Pa. 243 (1894.) In *Baran v. Reading Iron Co.*, 202 Pa. 274 (1902), it was held that evidence of precautions taken or repairs made after an accident is not admissible as tending in itself to prove prior negligence. This case apparently overrules *Link v. Phila. & Reading R. R.*, 165 Pa. 75 (1895) and *Lederman v. Pennsylvania R. R.*, 165 Pa. 118 (1895.)

CHAPTER XXII.

NEGLIGENCE—DAMAGES FOR PERSONAL INJURIES.

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| 135. Measure of Damages. | 142. Instruction as to Damages. |
| 136. Expenses. | 143. Evidence. |
| 137. Pain and Suffering. | 144. Examination of Injured Person by Inspection. |
| 138. Loss of Earning Power. | 145. Statute of Limitations. |
| 139. Loss of Minor's Services. | 146. Release of Damages. |
| 140. Injuries to Wife. | |
| 141. Excessive Verdicts. | |

Measure of Damages.

135. Damages for personal injuries consist of three principal elements: (1) the expenses to which the injured person is subjected by reason of the injury.

(2) The inconvenience and suffering naturally resulting from the injury.

(3) The loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury.¹

Expenses.

136. The expenses for which a plaintiff may recover must be such as have been actually paid, or such as in the judgment of the jury are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with the same effect that he may hire other persons, but in the ab-

¹ Goodhart v. Pennsylvania R. R., 177 Pa. 1 (1896.)

sence of an express contract the law will not presume one, so long as the family relation continues.²

Pain and Suffering.

137. Pain and suffering are a distinct and separate item for which damages may be awarded by the jury as compensation. It is, however, compensation, not as a precise equivalent or valuation nor compensation from a sentimental or benevolent standpoint, but such amount as will be the most reasonable approximation the circumstances admit to a pecuniary compensation not in the nature of things capable of exact measurement.³

Loss of Earning Power.

138. Loss of earning capacity is a proper element of damages, but it cannot be considered unless there is testimony on the subject.⁴

The loss of earning power involves an inquiry into the value of the labor, physical or intellectual, of the person injured before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Profits derived from an investment or the management of a business enterprise are not earnings. The jury should consider the plaintiff's age, state of health, business habits and manner of living, and also his past earnings. The loss of earning power cannot be proved, however, by expert testimony.⁵

In an action against a street railway company to recover damages for personal injuries, where the plaintiff states the amount of her wages at the time of the accident and that she was obliged to "lay off" from her work for a certain number

² *Goodhart v. Pennsylvania R. R.*, 177 Pa. 1 (1896.)

³ *Schenkel v. Pittsburg & Birmingham Traction Co.*, 194 Pa. 182 (1899); *Machen v. Railway Co.*, 13 Super. Ct. 642 (1900); *Goodhart v. Pennsylvania R. R.*, 177 Pa. 1 (1896); *Bamford v. Pittsburgh & Birmingham Traction Co.*, 194 Pa. 17 (1899.)

⁴ *Wallace v. Pennsylvania R. R.*, 195 Pa. 127 (1900.)

⁵ *Goodhart v. Pennsylvania R. R.*, 177 Pa. 1 (1896); *Wallace v. Pennsylvania R. R.*, 195 Pa. 127 (1900.)

of weeks it is not error for the court to instruct the jury that she can recover for wages lost.⁶

In an action for damages for personal injuries a woman who gave music lessons and did sewing at home may show that after she got a little better and could work about the house, she was compelled to employ extra help; and whatever the expense for the help was for that time she is entitled to compensation.⁷

Where a physician has testified to the permanent character of an injury, he may be asked whether the injury will affect the plaintiff's ability to perform labor.⁸

Profits derived from business are not earnings, and are not to be considered by the jury in estimating the damages.⁹

But profits derived from the management of a business may be considered as measuring earning power, especially where the business receives the personal attention of the owner; but it is not enough for plaintiff (a boarding-house keeper) to show that after she resumed business her house was not as well filled as before. The cause of the falling off, and its effects upon the profits must be shown.¹⁰

Loss of Minor's Services.

139. The measure of damages of a parent for injury to his child is the pecuniary loss to him. The elements to be considered in assessing the damages are the expenses which he has incurred or is likely to incur in the support of his child on account of the injury, and the loss which will probably result to him from the decrease in the earnings of the child to which he is entitled; but the increased inconvenience and trouble thereby caused to other members of the family cannot be considered.¹¹

A mother cannot recover damages for an injury to her minor child. In a case where suit was brought by the father as next friend to recover damages for injuries to his minor child, and

6 *Glenn v. Philadelphia & West Chester Trac. Co.*, 206 Pa. 135 (1903.)

7 *Willis v. Second Avenue Traction Co.*, 189 Pa. 430 (1899.)

8 *Palmer v. Warren Str. Ry.*, 206 Pa. 574 (1903.)

9 *Aiken v. Philadelphia*, 9 Super. Ct. 502 (1899.)

10 *Wallace v. Pennsylvania R. R.*, 195 Pa. 127 (1900.)

11 *Woekner v. Erie Elec. Motor Co.*, 182 Pa. 182 (1897.)

pending the suit the father died and the mother substituted of record as next friend, a verdict and judgment for the mother cannot be sustained. "The suit was originally brought by the father in his own right and as the next friend of his son. The cause of the father's action was the alleged negligence of the traction company resulting in injuries to the minor son, in consequence of which his services would be lost to the father during his minority. The cause of action arose May 6, 1897. At that time there was nothing for which the mother could have sued and the appellant was guilty of nothing subsequently which gave her a cause of action against it. The boy was not killed, but simply injured, and in such a case the cause of action is in the father alone as we have held for reasons which need not be repeated here, in *Fairmount & Arch Street Passenger Railway Co. v. Stutler*, 54 Pa. 375, and in *Pennsylvania R. R. Co. v. Bantom*, 54 Pa. 495. This cause of action was not split by the death of the father and until the Legislature gives the mother the right to sue in case of injury to a minor child caused by the negligence of another, and not resulting in death, we cannot give it to her. The Act of June 26, 1895, P. L. 316, gave the mother no right to sue. It simply gives a wife under certain circumstances equal power, control and authority with the father over a minor child and an equal right to its custody and services. It does not appear from the testimony that the family circumstances were such at the time of the injury as gave Mrs. Kelly under the Act of 1895 this equal right with her husband in the power, control and authority over her child and to his custody and services." ¹²

Injuries to Wife.

140. In an action of trespass to recover damages for injury to plaintiff's wife, it appeared that plaintiff's wife previously brought her action for the personal injuries declared for in plaintiff's statement and recovered a verdict and judgment. Plaintiff did not join in the suit, nor was there any rule taken on him to join. The court entered a compulsory non-suit, which it subsequently refused to take off. Section 1 of the Act

¹² *Kelly v. Pittsburg & Birmingham Trac. Co.*, 204 Pa. 623 (1903.)

of May 8, 1895, P. L. 54, provides: "Whenever injury not resulting in death shall be wrongfully inflicted upon the person of the wife and a right of action for such wrongful injury accrues to the wife and also to the husband these two rights of action shall be redressed in only one suit brought in the names of the husband and wife." Section 2 provides: "Either the husband or the wife may waive his or her right of action and his or her failure to join in the suit within twenty days after service of a rule to join, or be barred, shall be conclusive evidence of such waiver; but if both join in the suit, separate verdicts shall be rendered," etc.

Mr. Justice Mitchell, in discussing the construction of this Act, said: "The first section is mandatory, 'shall be redressed in only one suit.' The evil it was designed to remedy was real. Where separate actions were brought and tried at different times before different juries, the latter were apt to duplicate the damages. In the husband's action generally tried first the injury and suffering of the wife were naturally part of the evidence to show the extent of the husband's deprivation of her services, and the jury's sympathies with her inevitably, even if not altogether consciously influenced his damages. Then when her action came to trial the jury if they happened to hear of the other verdict were always carefully told that it did not include anything for the wife. The evil was not only real, but in practice substantial, and the Act to remedy it was mandatory not only in terms but also in intent. But it is claimed that the second section is inconsistent with this view, and that a second action may still be brought unless the husband or wife not party to the first shall waive the right by failure to come in after notice and rule. But there is no necessary repugnancy in the sections. The first prescribes that there shall be but one action, and that it shall be brought in the names of the husband and the wife. If this section stood alone a plea in abatement of the non-joinder would be fatal to the separate action. If the husband refused to join as is said by his counsel that he did in this case, there would be a hardship to the wife without remedy. The second section gives the remedy by the rule to join or be barred by conclusive evidence of waiver, and thereafter the separate action may proceed. The rule, it is

to be observed, is not to bring or be allowed to bring a separate action, but to come into the joint action which alone is permitted or be barred altogether. The provisions of the second section are as much for the benefit of the husband and wife separately or jointly as plaintiff or plaintiffs as they are for the defendant, and there is no obligation on one more than on another to procure a rule. Secondly, as to constitutionality. There is no natural right in one person to damages for injury to another. At common law the husband had an action for damages for injury to the wife, whereby he lost her services, because he had the right to her services, including her earnings. The right arose from the common law relation of unity of person, the husband as to personal property and services being the person. But marriage is a civil contract involving rights under the control of the law-making power. The Legislature may sever the unity of person and as to property, the right to separate earnings of the wife and the damages for personal injury to her, it has already done so to a very great extent. It would be but a step further in the same direction to take away altogether the husband's action for loss of services of the wife. *A fortiori* the power to destroy the right entirely includes the power to regulate its exercise. There is no constitutional right which is infringed by this act."¹³

Although in a joint action by the husband and wife under the Act of May 8, 1895, to recover damages for personal injuries to the wife, the two verdicts work an apportionment of the damages; the defendant is not such a party in interest as can complain of a mistake in the apportionment.¹⁴

Excessive Verdicts.

141. Although the court in negligence cases has no power to direct the jury as to the amount of damages measured in dollars and cents, which may be recovered, it is not bound to accept a verdict which, in its judgment, is clearly and immoderately excessive.¹⁵

¹³ *Donoghue v. Consolidated Traction Co.*, 201 Pa. 181 (1902); see also *Rockwell v. Sayre & Athens Electric Ry.*, 187 Pa. 568 (1898.)

¹⁴ *Helsel v. Consolidated Trac. Co.*, 14 Super. Ct. 420 (1900.)

¹⁵ *Gibbon v. Pennsylvania R. R. Co.*, 8 Kulp 492 (1897.)

Where in a suit for damages for personal injuries, the amount of a verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages the court should either reduce or set aside the verdict.¹⁶

A verdict for \$18,000 for the loss of a right arm is excessive, and a new trial will be granted on account of the excessiveness of the damages.¹⁷

A verdict for \$10,000 will not be set aside where the plaintiff, a woman of more than ordinary intelligence who had shown herself possessed of considerable force of character, who was able and obliged and was engaged in making a livelihood for herself and family, was found by the verdict of a jury to have been turned by the negligence of the defendant from a person of apparent vigor and health to a condition of almost complete wreck and dilapidation.¹⁸

Instruction as to Damages.

142. It is error for the court to use language which tends to inflame the damages. Thus a verdict for the plaintiff in an accident case will be reversed where the trial judge said to the jury, "No sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of the damages."¹⁹

In an accident case where the age of plaintiff is thirty years, it is reversible error for the court to say to the jury: "You will probably be warranted in acting upon the rule that a man in good health would live to the ordinary age of sixty-five or seventy years."²⁰

Where a person who had been previously injured by a fall from the building claims to recover damages from a street railway company for subsequent injuries alleged to have been received in a collision while he was a passenger on one of its

16 *Wood v. Roxborough, Chestnut Hill & Norristown Pass. Ry.*, 12 Montg. 155 (1896.)

17 *Musser v. Lancaster City Str. Ry.*, 15 Pa. C. C. R. 430 (1894); 8 York 111 (1894.)

18 *Mattis v. Philadelphia Trac. Co.*, 6 Dist. 94 (1897); 19 Pa. C. C. R. 106 (1897.)

19 *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

20 *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

cars, and the evidence is conflicting as to the character of the injury which he received on the car, and the testimony on the subject is voluminous and confusing, a judgment for the plaintiff will be reversed where the charge of the trial judge contained no clear statement of the questions involved, and no adequate presentation of any of them.²¹

Where in an action for personal injuries, plaintiff's counsel stated correctly to the jury the various elements of damage giving his view of the various items with amounts which they should find, to which the defendant's counsel objected before the jury retired, but in answer to the court says that he does not desire the court to further instruct the jury on the question of damages, it is not error for which a new trial will be granted.²²

In a negligence case where the court merely specifies in a perfunctory manner the items constituting the damage claimed as the result of the negligence of the company it is reversible error for the court to neglect in its charge to instruct the jury as to the rules of law applicable to such items of damage as loss of earning power, pain and suffering, and expenses incurred as a consequence of the accident.²³

In an action for personal injuries, the court instructed the jury that they could only give such damages as would compensate the plaintiff for her injury, "allowing her damages for the pain and suffering which she has undergone in the past and is likely to undergo in the future, and any permanent injury which you may deem she has suffered and also any expense which she has been put to in the way of obtaining relief." It was held that the charge was proper.²⁴

In an action for damages for personal injuries, the court after stating to the jury that plaintiff should be compensated for the time she had already lost by reason of her injury and her doctor's bill, further charged that the plaintiff "is entitled to such reasonable sum in addition to that as you think she ought to have as a recompense to her, not a compensation, be-

21 *Tietz v. Philadelphia Traction Co.*, 169 Pa. 516 (1895.)

22 *Steele v. Consolidated Trac. Co.*, 30 Pitts. 290 (1900.)

23 *Todd v. Second Avenue Traction Co.*, 192 Pa. 587 (1899.)

24 *Smedley v. Hestonville, Mantua & Fairmount Pass. Ry.*, 184 Pa. 620 (1898.)

cause you cannot compensate people for pain and suffering. No man would take the loss of an arm for any amount of money, but . . . the law leaves it for you to judge . . . what reasonable sum she ought to have as a recompense for the pain and suffering she has suffered by reason of the accident." Such a charge was held not to be erroneous, as the objectionable expression was immediately followed by an instruction to the jury to fix the amount.²⁵

In an action of trespass for personal injuries, it appeared that the accident on which the suit was founded was apparently trivial and there was nothing to indicate at the time that any serious results were likely to follow; that the injury to the plaintiff alleged to have been the consequence was as unusual as it was severe, and that suit was not brought until a year and a half after the accident without any notice to the defendant in the meantime. All that the court, in charging the jury, said about the accident was, "If this young woman, while she was in the act of getting off a car, was thrown to the ground and injured by reason of the conductor or motorman starting the car before she got off, then your verdict should be in her favor." The circumstances of the accident were not alluded to and no instruction was given to the jury on the subject of negligence and the burden of affirmatively proving it. A verdict and judgment for the plaintiff was reversed on the ground that the charge was inadequate.²⁶

In an accident case the court charged the jury: "Is she utterly incapable of doing anything, or can she follow some occupation with her other hand? If her right hand is gone will she be able to do anything and to earn some money?" The evidence showed that her hand was not gone, the testimony showing that she suffered great pain in it, and that it was merely conjectural whether she would lose it in the future, it was held the charge was inadequate, if not misleading and that a verdict and judgment for plaintiff would be reversed.²⁷

In an action for personal injuries where there is no evidence as to the age, habits, earning power or industry of the plaintiff

25 *Willis v. Second Avenue Traction Co.*, 189 Pa. 430 (1899.)

26 *Cooley v. Philadelphia Traction Co.*, 189 Pa. 563 (1899.)

27 *Cooley v. Philadelphia Traction Co.*, 189 Pa. 563. (1899.)

it is error for the court in submitting these questions to a jury to leave the entire question of damages to them without any adequate instructions to guide them in the calculation of the pecuniary loss of the plaintiff.

In an accident case it is not what is to be feared, but what is to be reasonably expected as the probable result of an injury, that is to be taken into consideration by the jury.²⁸

In a negligence case against a railroad company, where there was conflicting evidence as to the defendant's negligence, a judgment for the plaintiff will be reversed where the court in the portion of its charge relating to damages assumed the defendant's negligence, and uses language from which the jury would infer that their only duty was to assess the damages.²⁹

Where a person was injured by reason of a fall on an overhead bridge alleged to have been caused by a hole in the footwalk, a charge is defective which merely states to the jury that if the defendant was guilty of negligence the plaintiff could recover, without any instructions to the jury as to the degree of care required of the defendant in keeping the bridge in repair.³⁰

Where the court in a negligence case in the charge to the jury makes the testimony of the plaintiff prominent and conspicuous, without adverting in any way to the defendant's testimony which, if believed by the jury, might have resulted in a different verdict, a judgment for the plaintiff will be reversed.³¹

Where plaintiff has been injured in an accident case it is not error for the court to charge the jury that if they "believe that the surgical operation necessary to relieve or cure the plaintiff was a serious or critical operation necessarily attended with some risk or failure then the plaintiff is not bound in law to undergo the operation."³²

28 *O'Reilly v. Monongahela Str. Ry.*, 17 Super. Ct. 626 (1901.)

29 *Hayes v. Pennsylvania R. R.*, 195 Pa. 184 (1900.)

30 *Hayes v. Pennsylvania R. R.*, 195 Pa. 184 (1900.)

31 *Hayes v. Pennsylvania R. R.*, 195 Pa. 184 (1900.)

32 *Kehoe v. Allentown & Lehigh Valley Traction Co.*, 187 Pa. 474 (1898); 29 Pitts. 197 (1898.)

Evidence.

143. In an action against a street railway company to recover damages for personal injuries the evidence is sufficient to justify a finding by the jury that the injuries resulted from the accident, where two physicians and other witnesses testified that prior to the accident she was a healthy, able-bodied woman, but that after the accident she had aged considerably, had lost in weight, had a nervous tremor, had heart failure, and that her sufferings would be permanent, and one of the physicians stated that she had progressive paralysis of the spinal cord, was permanently disabled, and that the trouble would constantly increase, and that a concussion or blow upon the spine was the cause of the troubles described.³³

In an action for damages for personal injuries, the Carlisle tables are not conclusive of the plaintiff's expectancy of life and are not entitled to serious weight unless by precedent proof he has brought himself within the class of selected cases tabulated.³⁴

In an action for damages for personal injuries, where the Carlisle tables are admitted to show the expectancy of life of the plaintiff, the court must carefully guard the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. It is not sufficient to say that the tables are some aid, but not conclusive in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence or concerning which there is testimony should be called to the attention of the jury.³⁵

Examination of Injured Person by Inspection.

144. In actions for personal injuries the Court of Common Pleas cannot order a plaintiff to submit to a physical examination in advance of the trial.³⁶

In an action to recover damages for injuries resulting from the alleged negligence of a street railway company the court

33 *Guckavan v. Lehigh Traction Co.*, 203 Pa. 521 (1902.)

34 *Kerrigan v. Pennsylvania R. R.*, 194 Pa. 98 (1899.)

35 *Seifred v. Pennsylvania R. R.*, 206 Pa. 399 (1903.)

36 *Kunsman v. Harris*, 6 North. 230 (1898.)

will not, upon application of defendant, order the plaintiff to submit to an X-ray examination where defendant has neglected for more than a year after the injury was inflicted to ask for such examination and the time fixed for the trial is at hand.³⁷

Plaintiff was severely injured by the negligence of a traction company. By submitting to a comparatively new operation regarded by all as accompanied by comparatively slight risk of fatal issue plaintiff might have experienced substantial relief and been approximately cured. She was, however, unwilling to submit to the operation.

Willson, J., in holding that she was not bound to undergo an operation, said: "It does not seem to us reasonable that where one has been hurt by the negligence of another we should hold him or her bound in law to undergo a serious and critical surgical operation which would necessarily be attended with some risk of failure and of death. Some regard must be had to the instinctive human shrinking from such experiences. A person must be permitted to exercise a liberty of choice under such circumstances as to whether suffering and feebleness will be endured or whether the surgeon's knife shall be introduced. It seems to us that it would be inhuman to hold any other view of the case and no principle of law requires us to do so."³⁸

Statute of Limitations.

145. Actions for personal injuries not resulting in death must be brought within two years after the injury, whether the action be in *assumpsit* or trespass.³⁹

The Act of June 24, 1895, P. L. 236, did away with what was left of the common law rule in actions for personal injuries by providing that the action should not abate or the right be lost by the death of the wrongdoer, but by way of equalizing this advantage to the plaintiff, required all such actions to be brought within two years from the injury, unless death resulted, in which case the limitation was left, as under

³⁷ *Hocker v. Harrisburg Trac. Co.*, 5 Dauph. 62 (1902.)

³⁸ *Mattis v. Philadelphia Trac. Co.*, 6 Dist. 94 (1897); 19 Pa. C. C. R. 106 (1897.)

³⁹ *Boroswitz v. Union Trac. Co.*, 8 Dist. 676 (1899); 23 Pa. C. C. R. 243 (1899.)

the Act of 1855, to one year from the death. The result of the legislation is that before the Act of 1895 the party injured could bring his suit at any time within six years from the injury, but if he died before suit began his relatives must sue within one year from his death, and in either case his action or the right of his relatives to sue would terminate immediately on the death of the wrongdoer. Since the Act of 1895 the death of the wrongdoer does not terminate the action or the right thereof, but the latter right must be availed of within two years of the injury. The Act is constitutional, but it does not affect any vested right.⁴⁰

The Act of June 24, 1895, relating to actions for injuries wrongfully done to the person and limiting the right of action to two years from the time when the injury was done does not affect any vested right in a case where suit is not brought for more than three years after the passage of the Act. The remedy alone is affected. Thus, where a personal injury was suffered on January 12, 1895, an action to recover damages for the injury instituted on February 16, 1898, is barred by the Act.⁴¹

Release of Damages.

146. A person who executes a release of damages for personal injuries without any fraud or misrepresentation being exercised upon him cannot subsequently avoid the release by a claim that his injuries were more serious than he had anticipated at the time the release was executed.⁴²

Where a woman of intelligence and fair education after consultation with her friends and without fraud on the part of the street railway company executes to the company a release of damages for personal injuries, she will be concluded by the release, although her injuries may have turned out to have

⁴⁰ *Rodebaugh v. Philadelphia Traction Co.*, 190 Pa. 358 (1899) ; 30 Pitts. 24 (1899), per Mitchell, J. See *Byers v. Pennsylvania R. R.*, 18 Pa. C. C. R. 187 (1896) ; *Peterson v. Delaware, Lacka. & West. R. R.*, 9 Kulp 552 (1899.)

⁴¹ *Rodebaugh v. Philadelphia Trac. Co.*, 190 Pa. 358 (1899.)

⁴² *Kane v. Chester Trac. Co.*, 186 Pa. 145 (1898.)

been much more severe than she supposed them to be at the time she signed the release.⁴³

Where a person alleges fraud in the procuring of a release, such evidence must be clear, precise and indubitable, otherwise it is not error for the court to give binding instructions for defendant. Thus, where plaintiff accepted fifty dollars and signed a release of damages, duly witnessed, there can be no recovery although she and her sister who signed as a witness testified that she was asked to sign a receipt, that nothing was said about a release and that the paper was not read to her.⁴⁴

Where it appears that deceased and his wife the day before he died executed a release of damages, and there was no evidence to show mental incapacity on the part of the deceased, except an offer which was excluded by the court, to prove his condition on the day before he signed the release, a verdict directed by the court to be entered for defendant will not be reversed.⁴⁵

A person who executes a release of damages when *non compos mentis* will be deemed to have ratified the release, if, when restored to reason, he is made aware of the main facts of the settlement, and retains the money without making any offer to return it. It is not necessary that the affirmance of a release executed under such circumstances should be as solemn as the original act itself. Acquiescence with other circumstances may establish ratification.⁴⁶

The question as to whether a person knowingly executed a release of damages, is for the jury where the plaintiff testifies that when he executed the paper he was under the influence of anæsthetics without any mental power whatever, while five disinterested witnesses, four of whom were physicians, testified that the plaintiff was perfectly rational at the time he executed the release.⁴⁷

43 Seeley v. Citizens Traction Co., 179 Pa. 334 (1897.)

44 De Douglas v. Union Trac. Co., 198 Pa. 430 (1901.)

45 Bruns v. Union Traction Co., 185 Pa. 533 (1898.)

46 Gibson v. Western New York & Pennsylvania Railroad, 164 Pa. 142 (1894.)

47 Gibson v. Western New York & Pennsylvania Railroad, 164 Pa. 142 (1894.)

The question of the validity of a settlement in an action for personal injuries is for the jury, where it appears that three witnesses for the defendant testified that they were present and saw the plaintiff make his mark to papers of release, while six witnesses for the plaintiff, including his two attending physicians testified that plaintiff at the time the mark was alleged to have been made by him was mentally and physically incapable of entering into the transaction.⁴⁸

A railroad company set up as a settlement with plaintiff, a release signed by her, a check to her order purporting to have been endorsed by her mark and by the signature of her son-in-law. The plaintiff positively and unequivocally denied the settlement, the execution of the papers or the payment of any money. The court held that the case was for the jury.⁴⁹

Where a release was presented to plaintiff at a hospital at a time when she was suffering great pain; and was not read to her; and the agent of the defendant lifted her hand and touched her finger to the pen, and she did not know that she was signing anything or that any consideration was paid, the court will not hold such a release binding.⁵⁰

A release is not binding where the plaintiff testified that soon after the accident a person came to her house, representing that he was a friend of the conductor; that this same person came a second time and asked her if five dollars would cover her expenses up to that time by reason of the accident; that upon her replying that it would he produced a paper which he did not read to her and which he folded so that she could not see the writing, and which he represented to her as a receipt for \$5.00; that she signed the paper and that the person presenting it was in fact an agent of the company, and the paper itself a release in full. This testimony of the plaintiff was corroborated by the testimony of another witness, but was contradicted by the company's agent. Mestrezat, J., said: "The plaintiff was not only ignorant of the contents of the paper, but the company's agent misrepresented its contents and

48 *Julius v. Pittsburgh, Allegheny & Manchester Traction Co.*, 184 Pa. 19 (1898); 28 Pitts. 456 (1898.)

49 *Clark v. Lehigh Valley Railroad*, 24 Super. Ct. 609 (1904.)

50 *Holmes v. Union Trac. Co.*, 199 Pa. 229 (1901.)

without reading the paper to her or giving her an opportunity to read it, assured her that it was a receipt for the sum which she and the agent had agreed upon as compensation for the expenses incurred by her since she was injured. In addition to this, when he presented the paper for plaintiff's signature he had folded it so that neither she nor the witness could see its contents. These and the other acts on the part of the company's agent, disclosed by the testimony, clearly constitute fraud and having been established by the verdict of the jury, they relieve the plaintiff from the binding force of the instrument to which she attached her signature. The fraud perpetrated in procuring it, vitiated the paper and rendered it as inoperative and ineffective as though it had never been signed." ⁵¹

Plaintiff alleged that a written release set up by the defendant was secured from him when he was prostrated and unconscious from his injury. Four disinterested witnesses, including a physician, testified that the plaintiff was conscious at the time the paper was read to him, comprehended its contents, accepted the money consideration and signed it. It also appeared that plaintiff used the money afterwards with full knowledge that it came from the company and made no offer to return it before bringing suit. It was held that there was no error in giving binding instructions for defendant. ⁵²

An agreement by a street railway company to employ a disabled employe at \$1.50 per day the rest of his life is incapable of enforcement because of utter want of precision in its terms. ⁵³

Where a conductor was injured while in the performance of his duty and while confined to his house invited two officials of the company to his room, where he signed a general release read to him and executed in their presence and in the presence of his wife of all liability on the part of the company for his injuries in consideration of the payment to him of twenty dollars, together with the sum of one dollar and fifty cents for each day that he was confined to his house, and is paid such sums, he is

51 *Clayton v. Consolidated Trac. Co.*, 204 Pa. 536 (1903.)

52 *Laird v. Union Traction Co.*, 208 Pa. 574 (1904.)

53 *Ogden v. Philadelphia & West Chester Traction Co.*, 202 Pa. 480 (1902.)

not entitled in a subsequent action against the company on an alleged parol agreement made at the time of the written agreement, and alleged to be the inducement therefor to have his case submitted to a jury where his testimony, corroborated by the testimony of his wife was that the company would employ him at one dollar and a half per day for the rest of his life is absolutely denied by the two officials of the company. The fact that the company gave him other light employment and offered to continue to employ him as a toll gate keeper is not corroborative of the alleged parol agreement, where it appears that it was the usual custom of the company to give to disabled employees such work as they could perform.⁵⁴

⁵⁴ *Ogden v. Philadelphia & West Chester Traction Co.*, 202 Pa. 480 (1902.)

CHAPTER XXIII.

NEGLIGENCE—DEATH.

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|---|---|
| 147. Constitutional Provisions. | 152. Death of Parent. |
| 148. Measure of Damages. | 153. Death Benefits. |
| 149. Parties Plaintiff. | 154. Release of Damages. |
| 150. Death of Infant. | 155. Death Caused by Negligent
Act in Another State. |
| 151. Death of Son Over Twenty-
one Years of Age. | 156. Evidence. |

Constitutional Provisions.

147. In an action of trespass for death of plaintiff's husband the statement alleged that plaintiff's husband was killed on August 31, 1894, and it appeared that the action was not brought until March, 1896. Defendants demurred on the ground that the action was not brought within one year after the death of the decedent. The court, in sustaining the demurrer, held that section 2 of the Act of April 26, 1855, P. L. 309, providing that an action for death occasioned by the unlawful violence or negligence of another "shall be brought within one year after the death and not thereafter" is not repealed by Art. 3, Sec. 21 of the Constitution of 1874.¹

Measure of Damages.

148. In an action brought by a widow to recover damages for the death of her husband, the court cannot be charged with error in failing to lay down to the jury any proper measure of damages, where the trial judge after referring to the fact that at common law personal actions died with the person, and the change effected therein by statute said "the widow now has the right to bring suit for the pecuniary loss;" and in the same connection referring to the amount said "it

¹ Bachman v. Philadelphia & Reading R. R., 185 Pa. 95 (1898.)

ought to be a reasonable compensation;" and then proceeded to pointedly caution the jury in regard to the danger as well as the impropriety of rendering an excessive verdict.²

In an action by a husband to recover damages for the death of the wife, it is not error for the court to charge the jury without further elaboration that they could give the plaintiff the money value of his wife's life to him, unaffected by sentimental consideration.³

Where an action was brought in the lifetime of the injured party and survived by virtue of section 18 of the Act of 1851, the damages recovered by the personal representative should be the same as she could have recovered had death not ensued. Included therein are damages for her pain and suffering up to the time of her death and the diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that recovery in this case is for the death. It is still for the personal injury. An assignment before death of the cause of action will not bar it.⁴

Evidence to show the profits of deceased in a partnership business and that he furnished money in considerable amounts to his family is not admissible as to the amount of damage they sustained by his death.⁵

In a negligence case for the loss of a parent, an expectation of inheritance is not one of the elements of loss to children and should not be considered by the jury.⁶

Parties Plaintiff.

149. The right of action for death given by the Act of April 15, 1851, Sec. 19, P. L. 64, as amended by the Act of April 26, 1855, is conditioned upon two facts which must concur, first, that the injured party's death was occasioned by violence or negligence, and second, that no suit for damages had been

2 *Connor v. Electric Traction Co.*, 173 Pa. 602 (1896.)

3 *Waechter v. Second Avenue Traction Co.*, 198 Pa. 129 (1901.)

4 *Maher v. Philadelphia Traction Co.*, 181 Pa. 391 (1897), per Sterrett, C. J.; *McCafferty v. Pennsylvania R. R.*, 193 Pa. 339 (1899.)

5 *McCracken v. Consolidated Traction Co.*, 201 Pa. 384 (1902.)

6 *Wiest v. Electric Traction Co.*, 200 Pa. 148 (1901.)

brought by him. If the injured person begins suit, but dies before the case is called for trial his executors or administrators may, under the Act of April 15, 1851, prosecute the suit to final judgment and satisfaction. The only purpose of the Act of 1855 was to designate the persons who, in connection with the widow and in lieu of "the personal representative" should thereafter be entitled to exercise the statutory right of action, where no action had been brought by the decedent.⁷

Under the Acts of April 15, 1851, and April 26, 1855, where a man marries after he is injured, and brings no suit for his injury in his lifetime his widow may maintain an action to recover damages for his death.⁸

Under the Act of April 26, 1855, P. L. 309, the widow is alone entitled to maintain an action to recover damages for an injury causing death, although deceased may have left children surviving him. Such right of action cannot be assigned by the widow to a child before verdict, so as to enable the action to be brought or maintained in the name of the widow for the use of the child.⁹

Death of Infant.

150. Where the age, physical and mental conditions of a child six years old and the circumstances in life of its parents is shown, a verdict of \$1,518 will not be set aside upon the ground that there was not sufficient evidence of the value of the child's services or the cost of maintenance on which to base the verdict.¹⁰

A married woman who has been deserted by her husband may maintain an action in her own name against a railroad company to recover damages for the death of a minor child

⁷ *Birch v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway*, 165 Pa. 339 (1895); 25 Pitts. 283 (1895); *Maher v. Philadelphia Traction Company*, 181 Pa. 391 (1897.)

⁸ *Gross v. Electric Trac. Co.*, 180 Pa. 99 (1897), affirming 18 Pa. C. C. R. 29 (1896); 5 Dist. 294 (1896.)

⁹ *Marsh v. Western New York & Pennsylvania Ry.*, 204 Pa. 229 (1903); *Snyder v. Philadelphia & Reading Ry.*, 9 Dist. 3 (1899.)

¹⁰ *Hoon v. Beaver Valley Trac. Co.*, 204 Pa. 369 (1903.)

of herself and husband. The misconduct of the husband will not defeat the right of the wife to recover for the death of the child. The judgment, however, in her favor is not conclusive of her right to the whole fund. Whatever right the husband has is preserved by the court controlling the distribution until he has had a hearing.¹¹

Death of Son over Twenty-one Years of Age.

151. In an action by a mother for the death of her adult son, where the statement of claim shows the relation between the plaintiff and the deceased, plaintiff may show what loss, pecuniarily, she sustained in the death of her son.¹²

A mother may not recover damages for the death of her son above age if the deceased before and at the time of his death was a resident of Pennsylvania and his mother was and continued to be a resident of Italy. The mere fact of occasional remittances by the son to the mother is not sufficient under the Act of April 26, 1855, to allow the mother to recover.¹³

Where a mother sues to recover damages for the death of an adult son, the burden of proof is upon her to show the existence in fact of a family relationship which entitles her to maintain the suit.¹⁴

Death of Parent.

152. Under the Act of April 26, 1855, adult sons may recover damages for the death of their father, caused by the negligent act of another, although by reason of their father's death they have inherited a large fortune.¹⁵

Evidence that the children of deceased were benefited pecuniarily by the death of their father by receiving more from

11 *Kerr v. Pennsylvania R. R.*, 169 Pa. 95 (1895.)

12 *Blauvelt v. Delaware, Lackawanna & Western R. R.*, 206 Pa. 141 (1903.)

13 *Deni v. Pennsylvania R. R.*, 19 Pa. C. C. R. 7 (1896); 6 Dist. 15 (1896); affirmed by s. c. 181 Pa. 525 (1897); 28 Pitts. 31 (1897.)

14 *Deni v. Pennsylvania R. R.*, 19 Pa. C. C. R. 7 (1896); affirmed, 181 Pa. 525 (1897.)

15 *Stahler v. Philadelphia & Reading Ry.*, 199 Pa. 383 (1901), affirming 16 Montg. 198 (1900.)

his estate than they received during his lifetime is inadmissible.¹⁶

The Act of April 26, 1855, giving children a right to recover damages for the death of a parent, makes no distinction between children over age and those under, between those married or single, between those having homes and families of their own, and those still members of the parents' household. Such distinctions may have significance in determining the amount of damage pecuniarily suffered as limited by the Act of 1868, but they do not affect the statutory right on the part of children to a standing in court as claimants or suitors. Even children who do not live with their parents may recover damages if they have a reasonable expectation of a pecuniary advantage from the continued life of the parent.

In a case where three daughters brought suit against a railroad company to recover damages for the death of their mother it appeared that the mother lived in a mountainous region in the country, while the three plaintiffs lived in a city. The mother and all of her daughters were of very moderate means. Two of the sisters, with almost unbroken regularity spent the summer with their mother without paying board, and the mother at times gave money and clothing to one of the daughters who was unmarried. When the married daughters were ill, the mother would go to the city and nurse them without charge. It also appeared that for sixteen years the mother had furnished one of the daughters with potatoes used in her household without charging for them. It was held, that the evidence was sufficient to sustain a verdict of twenty-seven hundred dollars in favor of the daughters.¹⁷

Death Benefits.

153. Where a railroad employee who is a member of a railroad relief association agrees with the company that if he accepts benefits from the association, such acceptance shall operate as a release, and further agrees to "execute such further instrument as may be necessary formally to evidence such ac-

16 *Stahler v. Philadelphia & Reading Ry.*, 199 Pa. 383 (1901), affirming 16 Montg. 198 (1900.)

17 *Schnatz v. Philadelphia & Reading R. R.*, 160 Pa. 602 (1894.)

quittance," the employee if he accepts benefits cannot recover from the railroad company, although he may not have executed any other paper.¹⁸

Where a railroad company has contributed to the funds of a relief association composed of its own employees an agreement by a member of the association that the acceptance of benefits from the relief fund "for injury or death shall operate as a release of all claims for damages against said company," is not contrary to public policy, and does not violate the rule that a common carrier may not make a valid contract against its own negligence. "It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former he cannot justly ask the latter in addition."¹⁹

Where a railroad employee who is a member of a railroad relief association agrees that an acceptance of benefits by him shall be a release of the railroad company, the consideration for the release is sufficient if it appears that the railroad company assumed the obligation to take charge of the administration of the association, to pay all its operating expenses, to take care of its funds, be responsible for their safe keeping, to guarantee the obligations of the association, and to make appropriations to supply any deficiencies.²⁰

¹⁸ Ringle v. Pennsylvania Railroad, 164 Pa. 529 (1894.)

¹⁹ Per Mitchell, J., in Johnson v. Philadelphia & Reading Railroad, 163 Pa. 127 (1894.)

²⁰ Ringle v. Pennsylvania Railroad Company, 164 Pa. 529 (1894); 25 Pitts. 172 (1894.)

A contract between an employer and employee which preserves to the latter all his rights of action in case of negligence until after the facts have occurred and are known to him, is not against public policy.²¹

Where an action was brought by a New Jersey administrator in Pennsylvania against a railroad company to recover damages for the death of an employee of the railroad company who was also a member of the relief department of the company the defendant may not show in mitigation of damages that the mother of the deceased, as the latter's beneficiary, received death benefits from the relief department.²²

A railroad company which receives deposits from employees, pays interest thereon and at the death of the depositor pays the amount standing to his credit with all interest due thereon to a designated beneficiary is not exercising banking privileges within the meaning of the Act of May 13, 1876, prohibiting the same.²³

Release of Damages.

154. A husband who is injured by the negligence of a railroad company may release the railroad company, and if he subsequently dies by reason of the injury, his wife cannot recover damages for his death. In other words, the wife has no independent right of action for the death of her husband which the husband could not release.²⁴

21 *Ringle v. Pennsylvania Railroad*, 164 Pa. 529 (1894.)

22 *Boulden v. Pennsylvania R. R.*, 205 Pa. 264 (1903.)

23 *Machamar v. Pennsylvania R. R.*, 27 Pa. C. C. R. 76 (1902); 11 Dist. 719 (1902); 5 Dauph. 217 (1902.)

24 *Hill v. Pennsylvania R. R.*, 178 Pa. 223 (1896.) In this case Justice Green, after quoting and commenting upon the Act of April 15, 1851, P. L. 674, said: "Without this Act a cause of action for a specific act of negligence would have died with the person and there could then be no recovery by anybody. But that consequence of the existing state of the law it was desired to avert and, under the Act, the action does not die but survives to certain persons named. But it is an action for the same injury, and upon the basis of the same negligence. The Act accomplished the preservation of a right of recovery but it does not give, or assume to give, another and additional remedy to other parties for the same injury. If it would bear such a construction it would follow that by force of the Act there was a right to recover for the injuries to the husband considered

Death Caused by Negligent Act in Another State.

155. Where a person is injured in another State on a train starting from Pennsylvania, and subsequently dies of his injuries in Pennsylvania, no action can be brought in Pennsylvania by the widow of the deceased suing for herself and her children, unless there was a negligent act or omission in Pennsylvania which was directly responsible for the injury received in the other State.²⁵

Evidence.

156. In an action by a widow against a railroad company to recover damages for the death of her husband, a written statement signed by the husband before his death giving an account of the accident is admissible in evidence.²⁶

only as injuries to himself and in addition to that a new and other and independent right of action to the widow in her own right, and for her own benefit, and for the injury to herself. No such purpose is avowed in the Act, and no such meaning is within its language.

"We do not think the Act of April 26, 1855, P. L. 309, affects this view of the subject or makes any change in the fundamental character of the previous legislation. It simply enlarges the designation of the persons entitled to recover damages for an 'injury causing death' so as to embrace children or parents of the deceased, and expresses the mode of distribution of the damages recovered.

"The right of action was in its origin the sole property of the husband, and of course subject to his control. If he exercised it and conducted it to verdict, judgment and satisfaction in the courts, that was the end of it. Neither he nor any one else could maintain a second action for the same injury. So also he could compound it, and could adjust the amount to be received from the offending party and could agree that the amount received should be a full *solatium* for the injury and the damage sustained. That would be a necessary incident to his ownership of the right of action. Such an adjustment would be the full equivalent of a verdict, and judgment in an adversary proceeding. In either event the remedy would be exhausted. It would have to be conceded that this must be so, if subsequently to the adjustment, some other and more serious consequence resulted from the injury than any that was anticipated when the settlement was made, and we know of no reason why this would not be true when such ulterior consequence was the death of the party injured. The very question we are considering has been adjudged in the Queen's Bench in England in the case of *Read v. Great Western Railway Co.*, L. R. 3 Queen's Bench 555."

²⁵ *Derr v. Lehigh Valley R. R.*, 158 Pa. 365 (1893.)

²⁶ *Hughes v. Del. & Hudson Canal Co.*, 176 Pa. 254 (1896.)

CHAPTER XXIV.

ACCIDENTS AT PUBLIC GRADE CROSSINGS.

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| 157. Failure to Stop, Look and Listen is Negligence <i>per se</i> . | 164. Bicycler's Stop. |
| 158. Whether the Stop is at the Proper Place is Question for Jury. | 165. Duty of Traveler to Alight from Wagon. |
| 159. Obstruction of View by Standing Cars. | 166. Infants. |
| 160. Obstruction of View by Moving Train. | 167. Presumption of Care on Part of Deceased. |
| 161. Obstruction of View by Buildings. | 168. Speed. |
| 162. Obstruction of View by Trees and Embankments. | 169. Signals. |
| 163. Obstruction of View by Smoke. | 170. Safety Gates and Flagmen. |
| | 171. Crossing Over Sidings. |
| | 172. Negligence of Driver of Vehicle Not Imputed to Occupants. |
| | 173. Evidence. |

Failure to Stop, Look and Listen is Negligence *per se*.

157. Failure on the part of a person crossing a railroad track at grade to "stop, look and listen" is negligence *per se*. Plaintiff, while driving a two-horse team was injured at one of defendant's crossings. Plaintiff could see the track until he reached a point about twenty-five feet from the crossing, when his view was obstructed by a bridge. He testified that he drove slowly, looked and listened, but that he drove upon the crossing without stopping. It was held that plaintiff was guilty of contributory negligence and could not recover.¹

Where a person goes on the track of a railroad immediately in front of an approaching train at a point where nothing intervenes to obstruct the view, the court will say as a matter of law that he was guilty of negligence, notwithstanding the assertion that he stopped, looked and listened before going upon the track.²

¹ Ritzman v. Philadelphia & Reading R. R., 187 Pa. 337 (1898.)

² Sheehan v. Philadelphia & Reading R. R., 166 Pa. 354 (1895.)

A non-suit is properly entered where the plaintiff's own evidence shows that she did not stop, look or listen before stepping on the first four tracks at a crossing, and that after starting upon the tracks she did not look when she could have seen the locomotive which struck her, or, if looking, took the chances of getting across in front of it.³

Plaintiff while driving a wagon stopped at a point about one hundred and fifty feet from a railroad crossing. Looking to the east he was able to see trains approaching for a distance of six hundred feet, intercepted for a short distance by a station building, and from the west several hundred feet. At a point sixty feet from the crossing a view of the trains approaching from the east was unobstructed for a distance of four hundred and forty-five feet, and approaching the crossing nearer it became more extended. Having stopped at a distance of one hundred and fifty feet from it, appellant moved on at a walk toward it, without looking east, and having reached a point in close proximity to the tracks, the ends of the shaft of his buggy were struck by a train coming from the east, resulting in his being thrown out of his buggy, injured, and his horse running away. He testified that he did not see the train in question until it was within a short distance of him because he was not looking eastward, the direction from which it came, that he was leaning forward and looking westward, and again that he was looking the other way when the train came upon him and he subsequently directed his whole attention to the west for a distance of more than sixty feet from the crossing. Held that a non-suit was properly entered.⁴

There can be no recovery where the only two persons who saw the accident testified that deceased drove on the track without stopping and that the wagon was struck as it was in motion crossing the track; that the deceased was pulling the horse in an attempt to stop him, and that he could have seen the train if he had looked before going upon the track.⁵

3 *Smith v. Philadelphia & Reading R. R.*, 160 Pa. 117 (1894.)

4 *Canfield v. Baltimore & Ohio R. R.*, 208 Pa. 372 (1904.)

5 *Coppuck v. Philadelphia, Wilmington & Baltimore R. R.*, 191 Pa. 172 (1899.)

The testimony of the plaintiff himself that he stopped, looked and listened, immediately before going upon a railroad track, unsupported by other testimony and contradicted by the evidence of five witnesses, and by the fact that he was struck immediately upon going upon the track, is not sufficient to carry the case to the jury.⁶

A person cannot recover damages from a railroad company for injuries sustained at a grade crossing where it appears that she stopped at a point where a locomotive could only be seen for forty-one feet, and that she then went on and was struck by a locomotive the instant she touched the track, although if she had stopped at a point six or seven feet from the track, she could have seen the locomotive for a long distance.⁷

Plaintiff's husband while driving an open two-horse farm wagon approached from the eastward a double track railroad running in a general direction from north to south. The deceased stopped at a point about forty feet from the track, at which point a train could be seen coming from either direction for eight hundred or one thousand feet. At the crossing itself, a train could be seen for more than a third of a mile. The deceased could have seen the train which killed him, if he had looked when he was fifteen or twenty feet from the track. It was held that the deceased was guilty of contributory negligence, and that plaintiff could not recover.⁸

It is contributory negligence for a person after stopping at a point one hundred and twenty-five feet from a country railroad crossing to proceed again without again stopping in a heavy rain with the wagon curtains down and with the view obstructed until the tracks are reached and if he is killed by a passing train no recovery can be had for his death.⁹

Plaintiff's foreman driving plaintiff's covered bread wagon approached a grade crossing. While driving on the crossing from the north to the south side of the track after the horse

6 *Holden v. Philadelphia R. R.*, 169 Pa. 1 (1895), reversing 7 Kulp 52 (1893.)

7 *Derk v. Northern Central Railway*, 164 Pa. 243 (1894.)

8 *Gangawer v. Philadelphia & Reading R. R.*, 168 Pa. 265 (1895.)

9 *Knox v. Philadelphia & Reading Ry.*, 202 Pa. 504 (1902), affirming 17 Montg. 177 (1901.)

and front part of the wagon were across the west bound track, the rear part of the wagon was struck by the locomotive of a passenger train going west, breaking the wagon and destroying the bread and cakes. Plaintiff's evidence disclosed that he stopped at a distance forty feet from the track of the train which struck him; that from that point he could see an approaching train five hundred feet in the direction from whence the train which struck him came; that had he stopped fifteen or twenty feet from the track he could have seen the train at a distance of from three hundred to four hundred and eighty feet, and that he drove on the track from the point where he stopped forty feet distant from the track without a further stop. It was held that plaintiff was guilty of contributory negligence in not stopping nearer the track and the court refused upon motion to take off the non-suit.¹⁰

Plaintiff, after loading two trunks at defendant's depot upon his wagon which had a covered seat, drove along the highway for a distance of two hundred feet parallel with the railroad, being separated from it by a platform eleven feet wide and three feet high. The highway crossed the track at a point about fifty feet from the end of the platform. After driving this distance, of about two hundred feet in all, parallel with the railroad, plaintiff turned his horse toward the track intending to cross. Just then a fast train passed and the horse was struck either by reason of having been driven too near to the track or because in its fright it moved close enough to be struck by the passing train. The horse was killed, and plaintiff was injured. At the station plaintiff could see down the track for nearly a mile in the direction from which the train came. Plaintiff did not look down the track as he turned towards the crossing. It was held that the action of the court in entering a non-suit was proper.¹¹

Deceased driving a wagon was killed at a crossing. The only point in the road upon which he was driving from which the railroad could be seen in the direction from which the train came which struck him was about one hundred and

¹⁰ *Mealey v. Central R. R. of N. J.*, 5 North. 85 (1895.)

¹¹ *Fleschhut v. Lehigh Valley R. R.*, 206 Pa. 348 (1903.)

twenty-five feet from the railroad, and from this point a train could be seen from a point from six hundred to twelve hundred feet above the crossing to a point from two hundred to four hundred feet above it. From the point on the road at which the train could be seen there was no other point at which it could be seen until the horses' front feet were on the track. From the evidence it appeared that deceased did not stop, look and listen at any point, and that when he was near the crossing the gates were lowered from their upright position to an angle of forty-five degrees before the deceased passed under them, and that the bells upon the gates were rung. A compulsory non-suit was sustained.¹²

Defendant's employees at about eight o'clock in the evening ran a locomotive and tender over the Philadelphia and Reading Railroad. The locomotive with the tender in front was running at the rate of about eighteen miles an hour. About a mile from a station of defendant is a highway grade crossing and on the crossing the locomotive collided with a two-horse lumber team driven by the husband of the plaintiff who was fatally injured by the collision. The evidence for plaintiff was to the effect that no light was shown on the tender, or signal given. The highway before it made the crossing ran almost parallel with the railroad for one hundred and fifty feet, and then in a distance of more than one hundred feet additional reached the track. For the whole distance of two hundred and fifty feet the track on which the locomotive was coming was visible for nearly a mile, and there was nothing to prevent the rumbling sound of the locomotive being heard, or the side glare from its headlight from being seen for half a mile before the locomotive reached the crossing. It was held that plaintiff was guilty of contributory negligence and could not recover.¹³

Deceased, a woman with her senses of sight and hearing unimpaired, started in broad daylight to cross three tracks of a railroad. The undisputed facts showed that a train was approaching a quarter of a mile distant, and that she could see

¹² *Decker v. Lehigh Valley R. R. Co.*, 181 Pa. 465 (1897.)

¹³ *Hess v. Williamsport & North Branch R. R.*, 181 Pa. 492 (1897.)

the approaching train seventy feet off before she set foot on the track nearest her; that before she got off that track she could see it for one hundred and sixty feet; that before she put her foot on the next, the middle track, she could see it two hundred and twenty-four feet distant; and that before she stepped on the track whereon it was coming she could see it nine hundred feet distant. She stepped on the last track and was instantly killed. It was held that deceased was clearly guilty of contributory negligence and that there could be no recovery.¹⁴

A non-suit is properly entered where the evidence discloses that plaintiff in approaching a grade crossing stopped his horse at a point thirty-five feet from the track and looked both ways; that he then proceeded walking his horse and looking in the direction from which he expected a train which was about due and went directly upon the track without again stopping or looking and was immediately struck by a train coming in the opposite direction, although if he had looked in that direction he could have seen the train not only from the point at which he stopped, but at any point from that to the track for a distance of eight hundred and fifty-five feet.¹⁵

Plaintiff's wife and sister were driving in a wagon on a public road toward a crossing of the defendant company. They stopped at a point from two hundred and ninety-one to three hundred and twenty feet from the track, and then continued without again stopping to look or listen, although the view of the track for three thousand six hundred and seventy-five feet was not obstructed. A passing train struck the wagon and plaintiff's wife was killed. A judgment of non-suit was sustained on appeal.¹⁶

Plaintiff and his wife in driving home from church were injured in crossing a grade crossing over a railroad company. They stopped about fifty yards from the tracks and saw a train crossing the road going west. After the train had passed they continued toward the crossing and stopped again about fifteen yards from the track. They then drove on the track at a

14 *Baker v. Pennsylvania R. R.*, 182 Pa. 336 (1897.)

15 *Hartman v. Harris*, 182 Pa. 172 (1897.)

16 *Born v. Philadelphia & Reading R. R.*, 198 Pa. 409 (1901.)

walk without stopping, although if they had stopped a few feet from the track they could not fail to have seen the approaching engine as their view was unobstructed, until the front legs of the horse were upon the track, when they perceived an engine going east about fifty feet from them. Plaintiff tried to avert the accident by pulling his horse back off the track, but before he could do so the engine struck the horse, killing him and injuring his wife. It was held that because of plaintiff's contributory negligence a non-suit was properly entered.¹⁷

The failure of an engineer to blow his whistle or ring his bell in approaching a grade crossing is not sufficient to hold the company liable if the deceased by the reasonable use of his faculties could have prevented the accident.

The business of deceased, who was sixty-five years old, occasioned him to cross every morning a public grade crossing of defendant. He was found one morning from thirty to fifty feet west of a highway between the station platform and the track. The evidence showed that to a person approaching the crossing there was an unobstructed view for a distance of eighty yards, that the morning was clear and that no other train interfered with his view or hindered him from hearing the train which struck him. The court refused to strike off the non-suit, and held that there could be no recovery for his death.¹⁸

Plaintiff driving two wild, but not runaway, horses approached a grade crossing at a high rate of speed. The uncontradicted evidence showed that the horses were frightened at the noise of a factory one hundred and fifty yards from the track and started off briskly, but were brought under control, after which they went at a brisk trot. The driver applied the brake one hundred yards from the railroad and held on to stop them, but they went on at a smart trot upon the track when the wagon was injured. Plaintiff did not at any place on the street when approaching the crossing stop, look and listen. It was held not to be error to give binding instructions for defendant.¹⁹

17 *Baker v. Pennsylvania R. R.*, 15 *Lanc.* 35 (1897.)

18 *Griffith v. Pennsylvania R. R.*, 13 *Lanc.* 193 (1896.)

19 *Billet v. York Southern R. R.*, 11 *York* 173 (1898.)

Whether the Stop is at the Proper Place is Question for Jury.

158. The mere act of stopping before going upon a railroad track does not of itself show that the person injured stopped at a proper place, or that there was not another and better place where he should have stopped again, or that his duty of looking and listening was performed with proper care and attention; but stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clearly that no other inference can properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury.²⁰

It is the duty of a person approaching a grade crossing over a railroad to stop at a proper place and look and listen for an approaching train, and having observed this duty, he is also required to be especially vigilant and careful as he continues toward the crossing, especially if his view is obstructed. If there is another safe and better place for him to stop he should do so, but whether there was such a place and he failed to observe the necessary precaution or carefulness after he had once stopped at the usual and customary place of stopping is a question for the jury and not for the court.²¹

If the view from the highway is obstructed by standing cars and the smoke of a locomotive, and the evidence is conflicting as to whether the plaintiff stopped at the point from which the best view could be obtained, the question as to whether the plaintiff stopped at a proper place is for the jury.²²

Plaintiff's husband and son while riding on a sled drawn by two horses were killed at a grade crossing in a borough. The deceased husband, who was driving, stopped at what was ap-

²⁰ *Ely v. Pittsburgh, Cincinnati, etc. Ry. Co.*, 158 Pa. 233 (1893); *Smith v. Baltimore & Ohio R. R.*, 158 Pa. 82 (1893); *Toban v. Lehigh & Wilkes-Barre Coal Co.*, 24 Super. Ct. 475 (1904); *Newman v. Delaware, Lackawanna & Western Ry.*, 203 Pa. 530 (1902); *Siefried v. Penn. R. R.*, 206 Pa. 399 (1903); *Summers v. Bloomsburg & Sullivan R. R.*, 24 Super Ct. 615 (1904.)

²¹ *Newman v. Delaware, Lackawanna & Western R. R.*, 203 Pa. 530 (1902); *Muckenhaupt v. Erie R. R.*, 196 Pa. 213 (1900); *Corcoran v. Pennsylvania R. R.*, 203 Pa. 380 (1902); *Ayers v. Pittsburgh, Cincinnati, Chicago and St. Louis Ry.*, 201 Pa. 124 (1902.)

²² *Link v. Philadelphia & Reading Railroad*, 165 Pa. 75 (1895.)

parently the proper place to stop, from which place he could have seen the train that struck them, if it had been within five hundred feet of the crossing. He drove on at a walk, his view of the tracks extending as he advanced, and was struck on the nearest track after he had gone twenty or thirty feet. The condition of the street at the side of the tracks made the passage of the sled difficult, and the horses reared an instant before the collision. It was held that the case was for the jury.²³

Plaintiff's horse and wagon were injured at a grade crossing. The crossing over which plaintiff attempted to pass was composed of eleven tracks, some of which were main tracks and some sidings. Upon them were run not only cars propelled by steam, but also cars run by electricity. Plaintiff testified that he drove his team across the first two tracks, and went forward to a third track which was a siding running into a car barn or shed. Here he stopped as he saw on the next, or fourth track a locomotive and a few cars passing westward. When the locomotive had gotten a short distance away and had practically stopped, plaintiff listened and looked in both directions and started to cross the remaining tracks. He got over the third track, crossed successfully the fourth track on to the fifth track where the wagon was struck by an electric car. It was shown that at the point where plaintiff stopped he could see but a short distance, as his vision was obstructed by sheds, but that if he had gone further and placed himself upon the track upon which the locomotive was he could have had an extended view of the tracks. It was held that the question whether he stopped at the right place was for the jury.²⁴

Plaintiff was killed at a grade crossing. There was evidence that before driving on the track he stopped, looked and listened on the highway a short distance from the crossing, where the tracks could be seen a long distance in both directions. He then drove on the track without stopping again, as it was impossible at any nearer point to obtain a view of the tracks. The testimony as to whether a bell was rung or a whistle sounded was conflicting. It was held that the case

23 *Cromley v. Pennsylvania R. R. Co.*, 208 Pa. 445 (1904.)

24 *Newton v. Pittsburg & Lake Erie R. R. Co.*, 18 Super. Ct. 18 (1901.)

should be submitted to the jury, and that a verdict and judgment for plaintiff would be sustained.²⁵

Deceased, a woman, approached a grade crossing driving a wagon. There was a down grade towards the railroad track, and the view was obstructed more and more in descending by a stone wall on one side, and by buildings on the other. The deceased stopped at a point one hundred and seventy-five feet from the crossing. Here she waited some minutes, and while she was waiting a train was run northward, and after detaching three cars upon a siding by a flying switch, was continued over and beyond the crossing, and then back over the crossing again with no brakeman at the rear, and no warning except the ringing of the bell at the other end of the train. The deceased was struck as the train was run backwards. There was another place where the deceased could have had a better view of the tracks, but was so close as to be dangerous in case the horses should become frightened. It appeared that it was customary for the public to stop at the place where the deceased had stopped. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.²⁶

Plaintiff's horses were killed at a grade crossing. The driver of the team stopped, looked and listened at a point fifty to seventy-five feet distant from the crossing, and kept a continual lookout from the time he stopped until he entered upon the track. It appeared that intervening objects created obstructions to his sight and hearing, and that his horses were struck by a special train approaching the crossing at a speed of twenty miles an hour. It further appeared that the evidence was conflicting as to whether any signal was given by the engineer. It was held that the question whether the driver stopped at the right place was for the jury.²⁷

Plaintiff, with two companions, in a blinding snow storm

25 *Tiffany v. Delaware, Lackawanna & Western R. R.*, 185 Pa. 308 (1898.)

26 *Cookson v. Pittsburgh & Western Railway Co.*, 179 Pa. 184 (1897); 27 Pitts. 394 (1897.)

27 *Worthington v. Philadelphia & Reading Ry.*, 23 Super. Ct. 195 (1903); affirming 9 Del. 34 (1903.)

and before daylight, stopped within five feet of a crossing, looked both ways and listened for the sound of a bell or whistle, and hearing none walked on the track and was struck by an engine running thirty-five miles an hour, the headlight of which was to some extent obscured by the snow that clung to the glass, and by the snow in the surrounding atmosphere. It was held that the question whether plaintiff exercised proper care was for the jury. A verdict for plaintiff was sustained upon appeal.²⁸

Plaintiff was injured in driving over a grade crossing. He testified that he stopped at a point between sixty and seventy feet from the track, and that this point "was the best place I could get to look through." The view eastward from which the train approached was somewhat obstructed, but he said that at that point there was an open space of sixty feet through which he could see the railroad tracks in an easterly direction. Plaintiff further testified: "I looked out through there and there was nothing ahead of me, and I thought I could drive across." He succeeded in passing safely over two tracks and his horse got beyond the third track when his vehicle was struck and he was injured. It was held that the question of plaintiff's contributory negligence was for the jury.^{28*}

Plaintiff was driving two horses to a top buggy after dark on a country road which was crossed by the tracks of the defendant's road at an oblique angle. On the side on which the train approached the crossing and five or six hundred feet from it, the railroad tracks are of considerable depth. There was also a curve on the tracks with its convex side toward the highway. Plaintiff, when about one hundred and seventy-five feet from the crossing, stopped, looked and listened, and in order to obtain a better view turned his horses to one side so that he could see up the tracks as far as possible. Neither seeing nor hearing a train he drove on. After he had gone about twenty feet a boy who was riding with him drew down a side curtain and looked up the tracks and reported that no train was in sight. His horses were at this time at a slow trot

²⁸ *Kuntz v. New York, Chicago & St. Louis R. R.*, 206 Pa. 162 (1903.)

^{28*} *Seifred v. Pennsylvania R. R.*, 206 Pa. 399 (1903.)

and so continued until the crossing was reached. The diagonal crossing was forty-five feet in length, and going in the direction in which the plaintiff drove the left hind wheel of a wagon was three feet beyond the tracks before the right hind wheel was clear of them. The plaintiff knew nothing of the approach of the train until he was about the middle of the crossing, and then only by observing the flash of the headlight on the ground between his horses. The right hind wheel of the buggy was struck after the left hind wheel was clear of the tracks. No notice was given by whistle or bell or otherwise of the approach of the train which was running on a down grade at the rate of forty-five to fifty miles an hour. The place at which the plaintiff stopped was the usual place of stopping to look and listen for the approach of a train by those who used the highway, and it was the best place from which to observe the approach of a train as between that place and the crossing the view was obstructed by an embankment. The court held that the case was for the jury, and a verdict and judgment for plaintiff was sustained.²⁹

A man driving a heavily laden sled approached a grade crossing and stopped, looked and listened when he was about one or two lengths of the sled and team from the track. This place was the usual place where teamsters stopped before making the crossing. The court said in charging the jury that if the driver stopped at a place where the traveling public generally or customarily stopped, it is strong evidence that he stopped at a proper place. It was held that the use of the word "strong" in place of "persuasive," the word used in *Muckinhaupt v. Erie Railroad Co.*, 196 Pa. 213 (1900), was not erroneous, and that it was proper to submit the case to the jury.³⁰

Plaintiff approached a public grade crossing of an electric railway, driving a team of spirited horses hitched to a long and heavy market wagon. The evidence showed that he stopped, looked and listened before going upon the tracks, and that when he was upon the tracks it was impossible to get the horses

²⁹ *Muckinhaupt v. Erie R. R.*, 196 Pa. 213 (1900.)

³⁰ *Fry v. Pennsylvania Railroad Co.*, 24 Super. Ct. 147 (1904.)

off before the car struck them. The plaintiff in describing his position when he first saw the car said: "I could not go back; I had to go forward; my horses were under headway at a good rate of speed, and I would have had to stop them and back and turn around. I would have lost more time and it certainly would have killed the horses, or killed me and the horses both, because it would have hit the horses, or hit in about the double-tree." It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained.³¹

Plaintiff approached a crossing, driving a wagon, at a point where the railroad making the crossing was paralleled by another railroad about one hundred feet away. Plaintiff stopped, and while waiting he heard a whistle. He waited until he saw that the train which gave the signal was on the other railroad. After the train passed he drove on to the crossing, and was struck by a train coming from a direction opposite to that of the direction of the train on the other railroad. No signal was given by a whistle or bell, and the train would have passed over so much of the track as was visible from the crossing in a little less than thirty seconds. The day was dark and rainy, and the noise of the first train made it difficult to hear the second train. It was held that the question of plaintiff's contributory negligence was for the jury, and that a verdict and judgment for plaintiff should be sustained.³²

Plaintiff, a young woman somewhat deaf but of good eyesight, testified that as she was about to approach a railroad crossing, she stopped about two feet from the outside rail and looked and listened. Not hearing or seeing a train she started to cross, and was struck just as she was clearing the outside rail on the second track about eighteen feet from the point where she stopped. The evidence was conflicting as to what distance a train could be seen from the point where she stopped, one person stating it to be one hundred and twenty feet, and another, three hundred feet. There was evidence that the train was going at a high rate of speed and had given no

31 *Downey v. Pittsburgh, Allegheny & Manchester Traction Co.*, 161 Pa. 131 (1894.)

32 *Davidson v. Lake Shore & Michigan Southern Railway*, 179 Pa. 227 (1897); 27 Pitts. 386 (1897.) See also 171 Pa. 522 (1895.)

signal. Plaintiff's testimony was corroborated by other witnesses. It was held that the case was for the jury.³³

Plaintiff's wife, a woman sixty years of age, with defective eyesight, but good hearing, approached a public crossing and stopped, looked and listened before going upon the track. One of plaintiff's principal witnesses testified in one part of his examination that when the deceased was upon the northbound track, or in the space between the two tracks, the train which killed her could have been seen one hundred yards distant. In another part of his examination, he, however, testified that the deceased was in the centre of the track upon which the train was before he saw the approaching train and realized her danger. It was held that the case was for the jury.³⁴

The deceased approached a public crossing where there were two tracks. A witness for the plaintiff testified that the deceased stopped at a point about thirty feet from the crossing from which point the view along the track was about sixty-eight feet. This testimony was contradicted. At thirteen feet from the crossing the view along the track was six hundred and sixty-five feet, but at this point the safety gates if lowered would have come upon the driver, or between the horses and the driver. The plaintiff also offered testimony which tended to show that the train was run at a high rate of speed, and that the safety gates were up. It was held that the case was for the jury.³⁵

Plaintiff was killed while driving in a closed carriage over the grade crossing of defendant's railroad. There were four tracks at the crossing, and they crossed a highway on which there was a great amount of travel. There were no gates at the crossing, and no electric bell there to give notice of approaching trains. Deceased approached the crossing at sunset when rain was descending in torrents making it as dark as night. Three disinterested witnesses testified that he stopped with his horses' heads a few feet from the first track, then started across and was struck by a train on the fourth track,

33 *Arnold v. Phila. & Reading R. R.*, 161 Pa. 1 (1894.)

34 *Keng v. Baltimore & Ohio R. R.*, 160 Pa. 644 (1894.)

35 *Roberts v. Del. & Hudson Canal Co.*, 177 Pa. 183 (1896.)

moving at the rate of about fifty miles an hour. They also testified that no bell was rung or whistle blown, and as he started across the tracks they looked in the direction from which the train came and saw no train because of the rain and darkness. They testified further that there was no watchman at the crossing at the time of, or immediately before, the accident. The testimony for the plaintiff was contradicted in almost every material particular by the defendant's witnesses. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.³⁶

Plaintiff's husband was killed at a grade crossing at the intersection of Twenty-fifth and Wharton streets, in the city of Philadelphia, at about seven o'clock in the evening. The evidence on behalf of plaintiff was in effect that the night was a dark and foggy one, with drizzling rain; that he stopped, looked and listened at a proper place, and went upon the track where he was struck when he reached the center of the track by an engine running backwards down grade at a high rate of speed, without bell, light or whistle.

Defendant's witnesses testified that the night was clear; that the deceased was standing upon the track when they were struck; that they had a warning by a headlight, bell and whistle as well as by a shout from one of the crew of the train, and that the engine was not running at a greater speed than six to eight miles an hour. The court held that the questions of defendant company's negligence and plaintiff's contributory negligence were for the jury.³⁷

Plaintiff was severely injured at a grade crossing in a city. The evidence for plaintiff, which was contradicted in many important particulars, tended to show that the accident occurred on a very dark, drizzling, foggy night; that an object could be seen at but a very short distance; that a light shifting engine of the defendant company, without cars, was running backward at a rapid speed without any light on the tank; that no signal of its approach to the crossing was given by a bell or whistle; that plaintiff approached the crossing with the great-

³⁶ *Laib v. Pennsylvania R. R.*, 180 Pa. 503 (1897.)

³⁷ *Ragan v. Pennsylvania R. R.*, 189 Pa. 572 (1899.)

est care, and that he walked at an ordinary gait, stopping, looking and listening at proper places. Continuing his precautions he was about to step on the track on which the engine which struck him came when, in his own words, "This black object came out of the dark like a flash of lightning. I made a turn to jump and jumped away from it, and when jumping, it struck me and threw me out on the street." Plaintiff also said that he did not hear the locomotive until it was within six or seven feet from him.

Defendant contended that as the plaintiff swore he did not see the approaching engine until it was within six or seven feet of him, it is conclusive evidence that plaintiff did not exercise sufficient care in the performance of his duty to listen for an approaching train. The court held that the case was for the jury.^{37*}

Plaintiff was passing over the defendant's tracks on the sidewalk of a street when she was struck by the defendant's locomotive. The accident occurred on a very dark and foggy morning, making it difficult to see for any distance. She stopped about twenty feet west of the track, from which point on a clear day a person could see an approaching train for a distance of two hundred and fifty feet. She looked and listened, but saw and heard nothing. She then proceeded slowly along the sidewalk, and when in the act of stepping on the track was struck by the locomotive, coming, as she described it, "like a flash" without a headlight. Defendant's witnesses testified that the accident occurred in daylight, when the plaintiff, before crossing the railroad, could have seen several hundred feet in the direction of the approaching locomotive; that it was running up grade, puffing loudly, and at the speed of only four or five miles an hour; and that the bell was rung before and while passing over the crossing. It was denied that it was foggy, and the testimony tended to show that a brilliant headlight was on the engine, by reason of which and an arc light, located near the crossing, plaintiff could have seen the distance of a square from her. It was held that the case was for the jury.^{37**}

37* *McCusker v. Pennsylvania R. R.*, 198 Pa. 540 (1901.)

37** *Bard v. Philadelphia & Reading R. R.*, 199 Pa. 94 (1901.)

Where a person was injured in driving over a grade crossing in a country district, and the evidence as to whether the plaintiff stopped, looked and listened at a point fifteen feet from the crossing, as well as the evidence as to whether any signal was given by the train as it approached the crossing, was conflicting, the questions of the negligence of the defendant and the contributory negligence of the plaintiff are for the jury.³⁸

Where a plaintiff makes out a case for himself on his own testimony that he stopped, looked and listened, before going upon a railroad track, he cannot be non-suited, although one of his own witnesses showed his negligence, and to an extent he contradicted himself.³⁹

Obstruction of View by Standing Cars.

159. Where a crossing is unusually dangerous and the railroad track is obstructed by cars and lumber placed there by the railroad company, it is the duty of the employees of the company to use great care and caution in running the train over the crossing; and if the persons in control of a train do not use such care and prudence as are commensurate with the dangers, either by failure to give proper signals at the proper time and place, or in passing over the crossing at improper speed, and an accident results therefrom, the railroad company is liable in damages to the person injured.⁴⁰

A girl and a companion approached a public grade crossing at a point where there were four tracks. An engine with one car was standing on the first track to the left of the girl and her companion. An engine with a train of box cars were standing to their right on the third track, and a passenger train was approaching on the fourth track. Their whole attention was given to the standing engine. They considered and discussed the chance of crossing in safety before these engines would move, and decided to attempt to cross. They ran rapidly, with their heads down, looking at the ground, and step-

38 *Carman v. Central R. R. of New Jersey*, 195 Pa. 440 (1900); affirming 10 Kulp 87 (1900.)

39 *Ely v. Pittsburgh, Cincinnati, etc., Ry. Co.*, 158 Pa. 233 (1893.)

40 *Smith v. Baltimore & Ohio R. R.*, 158 Pa. 82 (1893.)

ped directly in front of the train approaching on the fourth track. They did not, at any time before crossing or while in the act of crossing, look or listen for an approaching train. Before they had crossed the first track they were twice warned by men who saw the danger into which they were walking to look out for the train on the fourth track. The passenger train was running at a moderate rate of speed, and notice of its approach was given by the blowing of the whistle and the ringing of the bell. It was held that a non-suit was properly entered.⁴¹

Plaintiff, on leaving the office where he was employed, stopped on the doorsill, about eighteen inches higher than the pavement, and looking over the tops of cars of a coal train then standing on the middle track, he neither saw nor heard any sign of a locomotive approaching on the north track. He then proceeded to cross through an opening about twelve feet wide that had been made in the standing coal train, and without stopping or looking either way on the next or north track which was then in full view, he stepped on that track and was struck and injured. Plaintiff described the accident as follows: "I stepped with the right foot forward over the first rail of the third track with the left foot up, and when I stood there, all at once, I heard a fearful rattling, that is the quick speed of the striking of the wheels against the track, against the rail; when I looked to the right, where it came up, I saw it coming at a fearful speed. There I was; backwards I could not go any more, because on account of my specs, I had to look around where to step to; I was too near the coal cars to make a jump back, and so I made up my mind to jump forward for my life. I made a jump forward, and just as soon as I had jumped I was struck." It was held that as the proper time and place for the plaintiff to have "stopped and looked," was just when he emerged from the opening in the standing coal train and before stepping on the north track, he was guilty of contributory negligence, and would not be entitled to recover damages from the railroad company.⁴²

41 *Martin v. Pennsylvania R. R.*, 176 Pa. 444 (1896.)

42 *Keppleman v. Philadelphia & Reading Ry. Co.*, 190 Pa. 333 (1899.)

Where a person, driving a two-horse team, approached a grade crossing where there are six tracks, and where there is only a narrow opening between standing cars and stops, looks and listens at a place where those using the highway usually stopped, the question whether he should have stopped again or whether he should have seen the train, is a question for the jury.⁴³

Plaintiff approached a public grade crossing in a top buggy. About ninety or one hundred feet from the railroad crossing he stopped, looked and listened, but did not see nor hear an approaching train. The testimony showed that there was a dip in the public road between the place where he stopped and the railroad, preventing him from seeing, which dip continued down to the railroad tracks, and that the track nearest him in his approach to the railroad was a siding upon which stood a large number of coke cars which further obstructed his range of vision on that side. Having stopped, looked and listened he drove his horse on at a walk, and just as he got past the siding on to the first track, was struck by an engine. The evidence was conflicting as to whether the engineer blew the whistle or rang the bell. It was held that the case was for the jury.⁴⁴

Deceased approached a grade crossing where there were four tracks. At the time a freight train, consisting of about sixty cars, was approaching from the north on the third track from him. He cleared the third track, and when upon the fourth track was struck by an engine coming from the north, and was killed. The track for a mile north of the crossing was almost straight. The speed of the freight train was about fifteen miles an hour, and that of the engine on the fourth track from forty to sixty miles per hour. There was conflicting evidence as to the distance of the freight train from the crossing at the time the deceased started to cross, and also as to whether the engine which struck the deceased gave a signal. The evidence for the plaintiff tended to show that the deceased stopped, looked and listened at a point a few feet from the first track. It was held that the case was for the jury, and a verdict and judgment for plaintiff should be sustained.⁴⁵

43 *Elston v. Delaware, Lackawanna & Western R. R.*, 196 Pa. 595 (1900.)

44 *Mellinger v. Philadelphia & Reading R. R.*, 18 Lanc. 369 (1901.)

45 *Philpott v. Pennsylvania R. R.*, 175 Pa. 570 (1896.)

Plaintiff stopped his team at a point fifty feet from a grade crossing, and looked and listened. His view to the east was shut off by two trains of box cars standing on the extra tracks between the main tracks. From the west he saw a freight slowly coming towards the crossing, but at such a distance he was in no danger from that direction, but whether a train was coming from the east he did not know as the standing cars prevented him from seeing. He testified that, thinking he was all right, he gave his horse a cut with a switch, starting him into a jog trot, and without again stopping or looking to the east drove on to the tracks and was struck by an express train coming from the east, although if he had stopped before going upon the first track he could have seen the express eight hundred feet off. It was held that the case was not for the jury, as plaintiff was clearly guilty of contributory negligence.⁴⁶

Where the evidence as to whether a signal was given before a train approached a grade crossing, is conflicting, the case should be submitted to the jury.⁴⁷

Deceased approached a grade crossing by a road parallel with the railroad, a short distance from it and some feet below it in grade. He was coming west, as was the train which struck him. There was a track between the road and the track on which the train was running, and on this track just east of the crossing were three locomotives with steam up and two or three freight cars. Plaintiff's witness, who was in the wagon with deceased, testified that deceased stopped, looked and listened at a point twenty-five or thirty feet from the north track—the one on which the engines and cars were standing—and then drove upon the track and was killed, the locomotive coming in collision with the rear end of the wagon. The evidence as to whether the approaching train blew its whistle was contradictory. The court, in discharging a rule for a new trial, said: "From all the evidence the jury might well find that the whistle blew when deceased was three to four hundred feet from the crossing; that not having begun to investigate as to whether there was a train to be avoided at the

⁴⁶ *Corcoran v. Pennsylvania R. R.*, 203 Pa. 380 (1902.)

⁴⁷ *Corcoran v. Pennsylvania R. R.*, 203 Pa. 380 (1902.)

crossing and owing to the presence of a number of other agencies he did not notice the signal; that he then drove on to a point near the crossing, stopped, looked and listened, but owing to the fact that the engines and cars stood on a line parallel with the course of the moving train the sight of it was cut off, and that having his attention distracted by escaping steam or other noises of the engines on the north track, he failed to hear the rumble of the train, and that thus the train making no signal after the whistle blown a half mile away came down behind and caught him on the crossing. The testimony in the case cannot be dealt with without the aid of a jury, and as, therefore, the amount of the verdict was not the result of mere prejudice, the court will not disturb it." ⁴⁸

Plaintiff was injured at a grade crossing. He testified that in attempting to pass over this grade crossing, which was over a three-track railroad, he came to a full stop when the horse's head was six or seven feet from the first track, and then leaned forward, looked in both directions along the line of the railroad and did not see nor hear any approaching engine or train; he then sat back in his wagon and started to cross at a faster gait than he had been driving, and when he had nearly cleared the crossing the rear part of his wagon was struck by a shifting engine which was running with the tank end towards him. Plaintiff also testified that at the distance of sixty feet to the eastward from the crossing there was standing an engine which was blowing off steam and smoke. It was held that the case was for the jury, and a verdict and judgment for plaintiff was sustained. ⁴⁹

Obstruction of View by Moving Train.

160. The deceased, driving a buggy, approached a grade crossing. When he was about thirty feet from the crossing he stopped and waited for a coal train to pass. As soon as the train was twenty feet past, the deceased drove slowly on the track, looking and listening, and was almost immediately struck by a train coming from an opposite direction on the other track, the view of which was cut off by the rear end of

⁴⁸ *Goggin v. Pennsylvania R. R.*, 26 Pitts. 151 (1895.)

⁴⁹ *Becker v. Pennsylvania R. R.*, 10 Super. Ct. 19 (1899.)

the passing train. It was clear beyond all possible doubt that the train which struck him could have been seen and the accident avoided had he waited for a single instant until the first train had passed far enough to clear the view. It was held that the plaintiff was not entitled to recover.⁵⁰

If a person, without fault on his part, is suddenly placed in a position of difficulty or danger he is not bound to the use of the best judgment in his efforts to extricate himself. At night on the sidewalk of a public street plaintiff approached a railroad crossing where there were four tracks. There were no safety gates or man at the crossing to give warning of danger. She waited until a train had passed, backing on the track nearest her, and before starting she saw that the sidewalk was clear, and the only train in sight was on the third track, having passed over the sidewalk, and was standing with its rear car twenty feet from the sidewalk with the engine at the other end. When she reached the second track she stopped and looked, and the sidewalk being still clear and the train not in motion she started forward the second time, and when close to the third track, or directly on it, the car was suddenly struck by the engine and projected on to the fourth track, where it struck her, inflicting injuries which proved to be fatal. It was held that the question of deceased's contributory negligence was for the jury.⁵¹

The husband of plaintiff approached a railroad crossing, and stopped to allow a receding train on a west bound track to pass. This train obscured his view of the other track for a considerable distance. There was evidence that the locomotive of the receding train emitted a dark smoke obscuring the view. Without waiting for the receding train to pass a sufficient distance to permit him to see a coming train on the other track he started to cross, and before he put foot on the east bound track he was struck. Had he waited a few seconds he could have seen the train or had he looked when on the west bound track he could have had a clear view for at least two hundred and ninety-two, if not four hundred and thirty feet, and thus have

50 *Hughes v. Del. & Hudson Canal Co.*, 176 Pa. 254 (1896.)

51 *Stover v. Pennsylvania R. R.*, 195 Pa. 616 (1900.)

seen the coming train; or had he looked before taking his last step he would have seen the coming engine. It was held that deceased was guilty of contributory negligence, and that a nonsuit was properly entered.⁵²

In a case where it appeared that plaintiff stopped, looked and listened and permitted a freight train to pass the crossing, a distance of two hundred and forty feet, and then drove upon the tracks and was struck on the second track by a passenger train coming from an opposite direction to that of the freight train at a very high rate of speed, without sounding a whistle or ringing a bell, the plaintiff is not guilty as a matter of law of contributory negligence, as the question is for the jury.⁵³

Plaintiff approached a crossing over a railroad at a time when a freight train running east was on the crossing. He stopped and waited until it had passed, and immediately thereafter, in response to beckoning signals from the flagman on the other side, and without again stopping until the freight train had so far passed as to give him a clear view of the tracks in front of him crossed over the first track and was struck and seriously injured by an engine on the second track which had been hidden by the freight train. It was held that the case was for the jury.⁵⁴

Obstruction of View by Buildings.

161. Plaintiff, having in charge a traction engine, threshing machine and water tank, approached a public grade crossing about nine o'clock in the evening. He stopped his engine about two hundred and ten feet from the crossing, at a point where his view of the tracks was obstructed by intervening buildings, although the testimony was uniform that as one approaches the crossing the view became better, so that within a few feet of the railway, where a stop could have been made with perfect safety the track would have been visible in daylight and the lights could have been seen after dark for more than five hun-

⁵² *Hovenden v. Pennsylvania R. R.*, 180 Pa. 244 (1897); affirming 13 Montg. 9 (1896.)

⁵³ *Wolfe v. Pennsylvania R. R.*, 22 Super. Ct. 335 (1903.)

⁵⁴ *Ayers v. Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.*, 201 Pa. 124 (1902.)

dred feet. Plaintiff, without again stopping, proceeded toward the crossing, and when his engine got upon the track he saw about two car lengths distant the rear lights of a train backing towards the crossing which struck the engine almost immediately. It was held that plaintiff was guilty of contributory negligence, and was not entitled to recover.⁵⁵

A street car conductor was injured at a grade crossing on defendant's road. The evidence showed that the crossing was near a station from behind which a car taking on passengers was hidden from an engineer approaching from the east. The engine which struck the plaintiff was running backwards on a down grade without a train on a wet rail on a foggy night, and gave no notice of its approach by signal or bell and displayed no headlight. According to the testimony of the conductor he went over to the railroad track, looked and listened, and not hearing or seeing an engine signalled to his car to come forward. When the car came to him and the front vestibule had passed him he turned to get on, and as the rear platform was about going on the track he stepped on the car and was almost immediately struck by the engine. There was evidence that when the front vestibule got to the track the engine was in sight some sixty or seventy feet away. The motorman said it was twenty or thirty feet from the car when he first saw it bearing down upon him. It was held that the case was for the jury, and a verdict and judgment for plaintiff was sustained.⁵⁶

Obstruction of View by Trees and Embankments.

162. Plaintiff was in the daytime driving along a perfectly familiar public road in a closely covered wagon. Plaintiff's evidence established the fact that in approaching the railroad crossing he stopped, looked and listened at a point where his view of the railroad was obstructed by trees extending along the railroad. Hearing and seeing nothing he drove ahead without again looking or listening, passing a point with which he was familiar from which, if he had stopped and looked, he

55 *Mann & Landis v. Philadelphia & Reading Ry.*, 1 Dauph. 51 (1898.)

56 *Doud v. Delaware, Susquehanna & Schuylkill R. R.*, 203 Pa. 227 (1902.)

could have seen the coming train. The court reversed a judgment for plaintiff on the ground that plaintiff was guilty of contributory negligence.⁵⁷

The plaintiff's wife, with three other persons, approached a public grade crossing where there were five railroad tracks having a general direction east and west. The street ran north and south. On the north side of the street was a cut between embankments about twelve feet in height. This embankment ran close up to the tracks. West of the crossing about three hundred and sixty feet was a sharp curve in the railroad beyond which an approaching train running east could not be seen. When it was growing dark plaintiff's wife, with her companions, started to cross the railroad. The evidence tended to show that by reason of the embankments nothing could be seen up or down the railroad tracks until a person was almost on the tracks. The parties stopped and listened when near the tracks, and neither hearing nor seeing trains started to cross. A passenger train, running at the rate of forty miles an hour from the west, came around the curve and struck and killed the deceased. The headlight of the locomotive of the coming train could be seen from four to six seconds before it reached the crossing, but, before it was seen, the testimony of two witnesses was, that the parties were on the tracks. There was evidence that no whistle was sounded or bell rung. It was held that the case was for the jury.⁵⁸

Obstruction of View by Smoke.

163. Deceased approached a railroad crossing in a wagon, stopping about five or ten feet from the track at a point where the track, when not obstructed by mist or smoke, could be seen for a distance of over nine hundred feet. At the time of the accident there was a slight mist, and the track was obscured by smoke for one hundred feet from where deceased was when he began to cross, walking his horses. He was struck after he had passed four tracks. It was held that a non-suit was properly entered. In the court below the judges differed in opinion, and the case was undoubtedly a close one.⁵⁹

57 *Wojochoski v. Central R. R. of N. J.*, 10 Super. Ct. 469 (1899.)

58 *Hoffmeister v. Penna. R. R.*, 160 Pa. 568 (1894.)

59 *Beynon v. Pennsylvania R. R.*, 168 Pa. 642 (1895.)

The husband of the plaintiff was killed while attempting to cross the railroad track of the defendant company. It appeared that the accident occurred about 5.30 in the morning and that he had safely passed over four tracks, but in crossing the fifth and last track was struck and killed; that he had stopped about five or ten feet from the track and had looked in the direction from which the train came. It also appeared that at the time he crossed, his view of the tracks was obscured by smoke so that he could not see beyond an hundred feet and that he did not wait for the smoke to lift but proceeded to cross, walking his horse. It was held that he was guilty of contributory negligence and could not recover from the company.⁶⁰

Bicycler's Stop.

164. A "bicycler's stop" by circling on a bicycle is not a stop within the meaning of the rule which requires a person approaching a railroad at a public crossing to stop, look and listen before going upon the tracks. A bicycler must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen in the manner required of a pedestrian. A bicycler approached a railroad track consisting of four tracks at a public grade crossing at a time when a freight train was passing. He did not dismount, but made a "bicycler's stop" by circling on his wheel round and round at a distance of five to ten yards from the track, and when the freight train had passed he started across without dismounting, and was struck and killed by a train coming in the opposite direction on another track. It was admitted that before reaching a position of actual danger there was a space of not less than seven feet from which an unobstructed view of the train could have been had. It was held that the bicycler was guilty of contributory negligence and his widow was not allowed to recover damages for his death.⁶¹

Duty of Traveler to Alight from Wagon.

165. If a traveler approaches a public crossing in a vehicle

⁶⁰ *Beynon v. Pennsylvania R. R.*, 15 Pa. C. C. R. 186 (1894); 3 Dist. 308 (1894.)

⁶¹ *Robertson v. Pennsylvania Railroad Company*, 180 Pa. 43 (1897.)

and cannot, from his seat in it, obtain a view of the tracks, he must alight and walk to a place where he can have a view.⁶²

It is the duty of a traveler when about to cross a railroad, if his view is obstructed so that he cannot see the track, to stop, look and listen, and if necessary to get out and lead his horses.⁶³

Where the uncontradicted evidence shows that a person driving a wagon approached a grade crossing and stopped at a point where he could not see the track far enough to observe an approaching train, and it further appeared that if he had descended from the vehicle and gone forward five feet he could have seen the train, a judgment of non-suit is proper.⁶⁴

Infants.

166. In an action to recover damages for the death of a child four and a half years old, killed at a grade crossing, the case should be submitted to the jury where the evidence tends to show that the crossing was in a populous district, that no safety gates were maintained, that there was but a single watchman, who was an elderly man, and that the cars which struck the child were going at a rate variously estimated at from four to ten miles per hour.^{64*}

Plaintiff, a child, was injured at a grade crossing. When he came to the crossing he found it blocked by defendant company's cars standing on the tracks. He then went southeasterly across the pavement to a point where there was an opening of about eighty feet between the cars still standing on the track, and while he was proceeding to cross the street through the opening, the cars were suddenly backed without any warning, and he was struck and knocked down. Plaintiff testified that the cars had been on the crossing from twenty minutes to half an hour; that he heard no whistle or bell or signal of any kind and that there was no one near either end of these trains to warn people. Witnesses for the defendant denied that the

62 *Kinter v. Pennsylvania R. R.*, 204 Pa. 497 (1903.)

63 *Kinter v. Pennsylvania R. R.*, 204 Pa. 497 (1903.)

64 *Kinter v. Pennsylvania R. R.*, 204 Pa. 497 (1903.)

64* *Lederman v. Pennsylvania R. R.*, 165 Pa. 118 (1895.)

crossing was obstructed; that there was an opening between the cars where the child undertook to cross, and that signals were not given. It was held that the case was for the jury, and a verdict and judgment for plaintiff was sustained upon appeal.⁶⁵

The question of a mother's contributory negligence for the death of her child four and one-half years old, killed at a grade crossing, is for the jury where it appears from the mother's own testimony that the child with her knowledge and consent left the dinner table, and went out through the kitchen and alleyway into a street from which he went on to the crossing where he was killed.⁶⁶

The plaintiff's son, a boy of six years and eleven months, was struck at a crossing of defendant's railroad and killed. The evidence showed that the accident occurred on a straight track with a clear view for two miles ahead; that the infant was seen fully half a mile away, and that the engineer and fireman did not ring a bell or blow a whistle. It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained.⁶⁷

A boy five years old was struck and injured by an engine of defendant company. It appeared that when he reached a street crossing he found it obstructed by the last car of an east bound train. He waited until the train had passed, and then crossed immediately behind the last car and was struck by an engine of a west bound train on the second track. There was evidence that no notice was given of the approach of the west bound train, and that it came upon the crossing as the other train moved off, and that it could not be seen by a person crossing the first track until he was almost in front of the engine. It was held that this testimony in an action by one to whom contributory negligence could not be imputed, the court was bound to submit to the jury. The court said: "An adult under the circumstances could not have recovered; he would have been held to the duty of waiting until the train which had

65 *Golden v. Pennsylvania R. R.*, 187 Pa. 635 (1898); 29 Pitts. 165 (1898.)

66 *Lederman v. Pennsylvania R. R.*, 165 Pa. 118 (1895.)

67 *Ely v. Lehigh Valley R. R.*, 3 Super. Ct. 509 (1897.)

obstructed the crossing had passed, and until he had a full view of the second track. But as the negligence of the child was not a bar to his recovery we have only to consider whether the plaintiff's testimony standing alone would justify the inference of negligence on the part of the engineer. If in the heart of a populous city, and from a point where his train could not be seen by those on the street and without giving notice in any manner, the engineer ran his engine over a street crossing which had just been cleared by a train which had obstructed it for some minutes, the jury might well find that he acted negligently. Any prudent person might apprehend that those whose way had been obstructed by a standing train would attempt to cross as soon as it had passed. It would have been a clear invasion of the province of the jury to have withdrawn the question from them."⁶⁸

Plaintiff's son, a lad nine years old, was killed at a point where a highway crossed defendant's track at grade at the end of a station platform. Plaintiff's house was on one side of the railroad and his shop on the other. Immediately before the accident the boy had been sent by his mother on an errand to his father to get some money to buy some groceries. The boy went to the station platform, where he met a companion. At this point there were two tracks, one being a main track and the other a switch. A train standing in front of the station moved out to go north. The boys continuing on the platform ran after the train, and when they reached the end of the platform, at the highway, endeavored to cross the railroad at the same speed immediately in the rear of the moving train. The deceased was struck and killed by a train going south on the switch. Two witnesses, one a newsboy awaiting the arrival of the train which caused the accident, as it carried his papers, and the other a passenger, intending to take the train, testified that they heard no signal of the approaching train, and that its engine, when approaching the crossing, could not be seen by reason of the departing train. They also said that it was moving at a pretty good speed. Another witness testified that

⁶⁸ *Smeltz v. Pennsylvania R. R.*, 186 Pa. 364 (1898); 15 *Lanc.* 265 (1898.)

he did not hear a bell rung or a whistle blown, while still another, an employe of the defendant company, who was standing on the rear platform of the last car of the outgoing train testified that he did not observe any signal being given. This testimony was contradicted by four of the crew in charge of the incoming train and another witness. The court held that the case was for the jury, and that a verdict in the parent's favor would be affirmed.⁶⁹

It is not contributory negligence for a mother to send a boy nine years old on an errand to his father, along a highway which will necessitate the boy crossing a railroad.⁷⁰

Plaintiff, a child ten years old, was injured in attempting to cross over a train which was obstructing a public crossing. It appeared that the plaintiff, upon approaching the crossing and noticing the obstruction, waited a while and then attempted to cross, and was injured by reason of the starting of the train while he was in the act of alighting. There was no evidence to show that the obstruction had not continued for an unreasonable time, and could not have been avoided by the exercise of reasonable care and diligence. It was held that the case was for the jury.⁷¹

Where a servant without authority takes his master's children in a wagon in which he delivers his master's goods, and the children are killed through the joint negligence of the servant and the railroad company, the father may recover.⁷²

Presumption of Care on Part of Deceased.

167. Where a person is killed at a grade crossing two presumptions arise: first, that the train men performed their duty, and gave warning by sounding a whistle or ringing a bell, and second, that the deceased stopped, looked and listened before going upon the crossing. The presumption as to either may be rebutted by competent evidence. Thus the first pre-

69 *Daubert v. Delaware, Lackawanna & Western R. R.*, 199 Pa. 345 (1901.)

70 *Daubert v. Delaware, Lackawanna & Western R. R.*, 199 Pa. 345 (1901.)

71 *Todd v. Philadelphia & Reading Ry.*, 201 Pa. 558 (1902.)

72 *Faust v. Philadelphia & Reading Ry.*, 191 Pa. 420 (1899.)

sumption may be overcome by the testimony of a single witness for the plaintiff that no whistle was sounded nor bell rung, if the railroad company offers no evidence on the subject. The second presumption may be rebutted by proof that the deceased could have seen the train in time to avoid the accident, if he had looked and listened, but the presumption stands unrebutted where the evidence shows that a standing freight train so completely shut off the view of the track that the approaching train which struck and killed the deceased was not visible a second before it struck him.⁷³

The law does not presume that the presence of a person upon a railway track is lawful; but will presume that a traveler upon a highway leading to a railroad track is lawfully upon the track for the purpose of crossing it. Between nine and ten o'clock deceased was found in a dying condition, lying a few feet from a crossing between the tracks of the railroad. The railroad maintained gates at the crossing, and a man to operate them during the day, but not at night; it also maintained three lamps at the crossing, which were kept lighted during the night. No one saw deceased on the crossing, and no one saw him struck by a train. It was held to be error to submit the case to the jury.⁷⁴

If a person approaching a grade crossing had stopped, looked and listened when he was within from thirty to forty feet of the railroad, he could have seen along the track at least a quarter to half a mile in the direction from which an engine came which struck him. It appeared that no one saw the accident. It also appeared that his body was found upon the pilot of the engine after it had passed the crossing, and that a buggy, in which the deceased was driving, was found broken to pieces near the crossing. It was held that the deceased's wife could not recover for her husband's death, inasmuch as the deceased could have seen the approaching train if he had stopped and looked. The presumption of care was rebutted.⁷⁵

The deceased was driving a wagon on a clear, moonlight

73 *Haverstick v. Pennsylvania R. R.*, 171 Pa. 101 (1895.)

74 *Welsh v. Erie & Wyoming Valley R. R. Co.*, 181 Pa. 461 (1892.)

75 *Seamans v. Del. Lackawanna & Western R. R.*, 174 Pa. 421 (1896.)

night on a turnpike road which was nearly level with the railroad tracks, and he crossed them diagonally. The decedent was familiar with the locality and the crossing. The country was open and comparatively level. Within three hundred feet of the crossing an approaching train could have been seen at the distance of a quarter of a mile, and within fifty feet it could have been seen for a mile or so from the crossing.

There was no witness to the accident. It was held that the presumption that the deceased stopped, looked and listened was rebutted by the evidence, and that his widow could not recover.⁷⁶

A driver stopped with his team fifty feet from the four tracks of the defendant company. He waited until a freight train passed going west on the third track. He then drove forward at a walk, looking east and west until his mules were about stepping on track No. 1. They crossed No. 1 and had their feet upon track No. 2 when the driver was warned by a person on the sidewalk of a train approaching from the west. The driver attempted to back his mules, and succeeded in getting them off track No. 2 upon track No. 1, where they were struck. It appeared that the train could be seen at a point four hundred and eighteen feet west from the crossing. The driver, however, testified that he looked in that direction just before his mules stepped upon track No. 1 and saw no train. It was held that a non-suit was improperly entered, and that the question of defendant company's negligence and plaintiff's contributory negligence was for the jury.⁷⁷

Plaintiff, driving a large country wagon, in approaching a grade crossing, stopped at a point about three hundred and thirty feet from the railroad, and then continued without again stopping to look and listen, although at a number of places within the three hundred and thirty feet he could have seen the train by which he was killed. It was held that his failure to stop, look and listen while traversing the three hundred and

⁷⁶ *Sullivan v. New York, Lake Erie & Western R. R.*, 175 Pa. 361 (1896.)

⁷⁷ *Breunniger v. Pennsylvania R. R.*, 9 Super. Ct. 461 (1899); 16 *Lanc.* 164 (1899); reversing 15 *Lanc.* 6 (1897); 11 *York* 97 (1897.)

thirty feet was negligence *per se*, and that a non-suit was properly entered.⁷⁸

Deceased approached a public highway crossing. He first came to a sidetrack on which were two freight cars. A coal train was on the main track about to move. He stopped on the sidetrack at the end of one of the freight cars. He remained there, and looked as far as he could until the coal train moved out. As soon as the last car had passed, he stepped out on to the main track, and was struck and killed by a locomotive which was following the coal train, about sixty feet behind. The evidence as to whether the locomotive made a signal, was conflicting. It was held that the question whether ordinary care demanded that deceased should wait longer behind the freight car, or that he should step out into the space between the siding and the main track, and look up the main track before stepping on it, was for the jury to answer, and not for the court. A verdict and judgment for the deceased's wife was sustained.⁷⁹

Plaintiff was killed at night while riding a horse over a public crossing. There were no witnesses to the accident, but the evidence for the plaintiff, although contradicted, tended to show that the night was so dark that the engine approaching the crossing, running backward, could not be seen; that it gave no warning by whistle or bell of its approach; that it carried no lights; that it could not be seen by a person approaching the crossing, and that it ran so noiselessly that it could not be heard. It was held that the case was for the jury. In such a case the presumption is that the deceased performed his duty as he approached the crossing, by stopping, looking and listening.⁸⁰

If a person, in approaching a track, had an opportunity at a distance of about fifty feet from the track to see it for about one thousand feet, and again at about twenty-five feet, an intervening obstruction having been passed, to see the track for one

⁷⁸ Gleim v. Harris, 181 Pa. 387 (1897.)

⁷⁹ Gray v. Pennsylvania R. R., 172 Pa. 383 (1896); 26 Pitts. 271 (1896.)

⁸⁰ Blauvelt v. Delaware, Lackawanna & Western R. R., 206 Pa. 141 (1903.)

thousand feet, the presumption that the person, who was killed by a train, stopped, looked and listened, is rebutted.⁸¹

Plaintiff was killed in attempting to cross at a crossing over defendant's tracks. One witness testified that the deceased, when within two feet of the track, stopped and looked both ways, and then went on and was struck by the engine when about the middle of the track. Another witness testified that when the engine was one hundred and fifty feet from the crossing, he saw the deceased approaching the track, and that he went on without stopping or looking and stepped in front of the engine. There was a curve in the track a short distance from the crossing and an embankment at its side. The rate of speed at which the plaintiff's witnesses testified it was running would have brought the engine to the crossing within a few seconds of the time when it was first visible to a person standing within two feet of the track.

The lower court held the case to be for the jury, who rendered a verdict for plaintiff. Defendant appealed, and Fell, J., said: "The case presented by the plaintiff's testimony was not one in which it could be said by the court that the presumption that the deceased stopped, looked and listened was effectually rebutted by the facts established, or that having seen or heard he went on heedless of an obvious danger. The case was necessarily for the jury, and no exception was taken to the general charge which was clear and adequate. The assignments relate to the answers to the points for charge. It appeared that at the place of the accident the tracks of the Philadelphia and Erie Railroad are nearly parallel to those of the defendant's road, and about eighty feet distant from them, and that a train on that road was passing at that time. The defendant's third point is: 'If the jury finds from the evidence that the plaintiff was struck by the moving train of the defendant company, which was plainly visible from the point he occupied when it became his duty to stop, look and listen, he must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an

81 *Connerton v. Del. & Hudson Canal Co.*, 169 Pa. 339 (1895); 26 Pitts. 77 (1895.)

obvious danger, and the plaintiff cannot recover.' The fourth point is: 'If the jury find from the evidence that the plaintiff, when approaching the track of defendant company, did stop, look and listen at a point where he was seen by the fireman on the locomotive and then moved forward on the track of the defendant company, where he was struck by the moving train which was carrying a headlight in full blaze upon the locomotive which was plainly visible to him at the time, he was guilty of contributory negligence, and the plaintiff cannot recover.' The answer to the third point is: 'This is affirmed unless you find from the evidence that his attention was drawn or attracted to the train on the Philadelphia and Erie Railroad track approaching in the same direction, and that he did not see the approaching train upon the defendant's track.' The answer to the fourth point is substantially the same.

"The legal propositions presented by these points were fairly raised by the testimony, and they should have been affirmed without qualifications.

"In the case before us the noise of the train on the Philadelphia and Erie Railroad may have prevented the deceased from hearing the train which was approaching the crossing on defendant's road. Whether he received warning by the sense of hearing was a fact to be determined by the jury, and the fact that there were two trains, was one of the circumstances to be considered. But there was nothing to interfere with or confuse his vision. If he did not look, or if he saw the train, and went on he was negligent. The points leave no ground for the assumption that the trains may have come into view after he looked. The case presented by them is that the train was plainly visible from the point the deceased occupied when it became his duty to stop, look and listen. Seeing a train on the other road did not excuse him from looking for one on the road he was about to cross. It was this road that he was bound to watch. If he did not look because his attention was attracted by the other train, he was nevertheless negligent. The qualifications to the answers to the third and fourth points introduce an element of uncertainty which would go far toward abrogating a wise and well-established rule that a person cannot recover, if, in spite of what his senses must teach him, if

he uses them, he steps in front of a moving train. The hypothetical case presented by the second point is that the deceased saw or heard an approaching train. He may have heard a train approaching on the defendant's road and have mistaken the noise made by it for the noise of the train on the other road. As stated before, the circumstances that two trains were so near the crossing may have confused and misled him. Whether on this ground he was negligent was for the jury, and it would not have been error to have refused the point. The defendant's third and fourth assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*."⁸²

Speed.

168. Proof of excessive speed at a crossing, when accompanied by facts showing proper safeguards for the customary and ordinary use of the crossing is insufficient to take the case to the jury. In attempting to drive over a grade crossing of a railroad company plaintiff's wagon became stalled on the tracks of the railroad company by reason of the snow and ice on the planking. Before the horses could be unhitched from the wagon, a train traveling at the rate of sixty miles an hour arrived and killed the two horses. Effort was made by the employees of the railroad to give notice to the approaching train by dispatching a man toward it with a red flag, and by dropping a block signal seventy-five feet beyond the crossing. The engineer, however, was unable to stop the train after seeing the signal before the collision occurred. It appeared that the crossing could be seen at a distance of about forty-four hundred feet, looking through a tunnel; that the crossing was protected by gates in charge of a gateman, and that the wagon had ample time to make the crossing if it had not become stalled. The court refused to take off a non-suit, as there was not sufficient evidence of the railroad company's negligence to submit the case to the jury.⁸³

Where a grade crossing is shown to be in a sparsely settled

⁸² Muscarro v. New York Central & Hudson River R. R., 192 Pa. 8 (1899.)

⁸³ Custer v. Baltimore & Ohio R. R., 19 Super. Ct. 365 (1902); s. c. 8 Del. 368 (1902); affirmed in 206 Pa. 529 (1903.)

township two miles on one side and five miles on the other side from other crossings, the court should declare as a matter of law that the railroad is not negligent in running its trains by the crossing without checking speed, the view being unobstructed.⁸⁴

In an action to recover damages for a child killed at a grade crossing evidence that a city ordinance forbade trains to be run at a higher rate of speed than five miles an hour, may be considered in ascertaining whether or not the train was being negligently run, but such an ordinance is not in itself evidence of negligence.⁸⁵

If a person is placed in a dangerous position by reason of the high rate of speed of defendant's engine, he cannot be charged with negligence if he becomes bewildered and steps the wrong way.⁸⁶

In determining the contributory negligence of a person at a grade crossing it is not only necessary to consider the plaintiff's conduct, but also that of the defendant. Both parties have the right to be at the crossing, and each party has also the right to act with the belief that the other will exercise his right at the place, in the manner and way his duty required him to do. The duty of those in charge of the locomotive is to run the locomotive at a rate of speed, not dangerous to pedestrians exercising due precautions. The pedestrian is justified in believing that the railroad employees will perform their duty in this respect, and can act on such assumption without any imputation of negligence. If a locomotive approaches a crossing at such a reckless rate of speed as to prevent a person, by the use of sight and hearing in the position which he has placed himself and which would have been safe had the railroad company used the care demanded of it, he cannot be charged with negligence.⁸⁷

The testimony of a passenger whose training or experience had not qualified him to judge of speed, that "a train was run-

84 *Carman v. Central R. R. of New Jersey*, 10 Kulp 87 (1900); affirmed in 195 Pa. 440 (1900.)

85 *Lederman v. Pennsylvania Railroad*, 165 Pa. 118 (1895.)

86 *Bard v. Philadelphia & Reading Ry.*, 199 Pa. 94 (1901.)

87 *Bard v. Philadelphia & Reading Ry. Co.*, 199 Pa. 94 (1901.)

ning at the rate of sixty miles an hour" on a rainy day across a country crossing is insufficient to carry a case to the jury, especially when such testimony is contradicted by the schedule of the train and the positive evidence of the engineer.⁸⁸

Signals.

169. While in grade crossing cases affirmative evidence that a whistle was sounded or a bell rung is entitled to great weight, yet if there is no such affirmative evidence offered, the evidence of one person who was in close proximity to the crossing when the accident occurred, that no whistle was sounded nor bell rung, is sufficient to carry the case to the jury, if the presumption that the person killed, stopped, looked and listened, is un rebutted.⁸⁹

The testimony of a passenger alone that he did not hear any whistle or bell, as a train approached a country crossing when contradicted by the testimony of the engineer, fireman, conductor and brakeman is merely a scintilla of negligence, and is insufficient to carry a case to the jury on the question of a railroad company's negligence.⁹⁰

Where the testimony of two witnesses, who were interested in the arrival of a train, supported by the testimony of two other witnesses that none of them heard any bell rung as a train approached a crossing is contradicted by the testimony of four of the crew in charge of the train, the case is for the jury.⁹¹

A person injured at a railroad crossing on a dark night is entitled to have his case submitted to the jury where the evidence on his behalf, although contradicted, tended to show that the train which caused the injury approached the crossing without ringing a bell or giving a signal, that a car was left standing over the sidewalk; that plaintiff in going around the car "stopped, looked and listened" before going upon the track,

⁸⁸ *Knox v. Philadelphia & Reading Ry.*, 202 Pa. 504 (1902); affirming 17 Montg. 177 (1901.)

⁸⁹ *Haverstick v. Pennsylvania R. R.*, 171 Pa. 101 (1895.)

⁹⁰ *Knox v. Philadelphia & Reading Ry.*, 202 Pa. 504 (1902); affirming 17 Montg. 177 (1901.)

⁹¹ *Daubert v. Delaware, Lackawanna & Western R. R.*, 199 Pa. 345 (1901.)

and that he stumbled over a pile of snow, dirt and ice which he encountered.⁹²

In an action by a father to recover damages for the death of his children, it appeared that the children were riding in an omnibus which was run into at a crossing.

Plaintiff alleged that the engineer did not give timely notice of the approach of the train, and that he did not stop the train after he had seen the omnibus on the track, either because the appliances furnished for that purpose were defective or because he failed to use them properly. Plaintiff testified that he was in a carriage an eighth of a mile back of the omnibus, and because of his solicitude for the safety of his children who were in the omnibus, he listened for signals of the approach of the train and heard none. A witness called by him testified that the whistle was sounded six times when the engine was at a point not fixed with precision as to distance, but which was at the south end of a cut, the north end of which was five hundred and seventy feet from the crossing, and that from this point the bell was rung continuously until the collision took place. The fireman of the engine, who was called by the plaintiff testified that the engineer applied the brakes and sanded the track as soon as he saw the horses; that he did everything in his power to stop the train, and that the appliances were all in good order, with the possible exception of one of the pipes by which sand was conducted to the tracks which had been clogged by dampness during the trip. The testimony showed that the train was running at the rate of fifteen or twenty miles an hour at the crossing and after the efforts of the engineer to slacken its speed; it was held that a non-suit was properly entered.⁹³

Plaintiff's son, an infant seven years and eleven months old, was struck by a train of defendant company at a crossing and instantly killed. The evidence tended to show that the train was running rapidly on a straight track, and that the engineer had a clear view thereof from his cab window for two miles

⁹² *Howett v. Philadelphia, Wilmington & Baltimore R. R.*, 166 Pa. 607 (1895.)

⁹³ *Jones v. Lehigh & New England R. R.*, 202 Pa. 81 (1902.)

ahead. A witness for the plaintiff testified that plaintiff's son started on a run from the house, accompanied by his dog; that he seemed not to have observed the approaching train and never stopped until he was struck by the locomotive on the crossing. On the other hand, the fireman testified that when the train was half a mile distant from the scene of the accident he noticed the boy at the crossing, standing four or five feet from the left rail, the dog being between the tracks; that he so remained facing the coming train, until the engine was as near to him as the length of two or three rails, when he ran as fast as he could in an attempt to cross the track; that when he got on the middle of the track he disappeared from view, the front of the engine concealing him, and that he then went quickly to the right hand side of the engine, and looking back saw a boy that he supposed was the same standing near the rear of the train uninjured. The engineer testified that he did not see the boy at all. It was admitted that the whistle was not blown, nor the bell rung, south of the whistling post, which was two hundred and seventy-eight rods and thirteen feet north of the crossing where the accident occurred. It was held that it was for the jury to decide whether some danger signal should not have been given, and a verdict and judgment for plaintiff was sustained. The court said: "We do not say that it was the duty of those in charge of the train to stop or perhaps even to slacken speed, but it was for the jury to say whether some danger signal should not have been given. The whistle and bell on a locomotive ought to be used, not merely in an effort to save those who are in actual peril, but as well to warn those who, there is any reason to fear, may involuntarily put themselves in place of danger. It is quite probable that a few short, sharp sounds of the whistle would have aroused and alarmed the boy and caused him to advance or retreat to a place of safety instead of waiting until the locomotive was almost upon him." ⁹⁴

Where a father suing for the death of his children at a railroad crossing testifies that he was in a carriage an eighth of a mile back of the omnibus which carried his children, and because of his solicitude for their safety, listened for signals of

the approach of the train and heard none, his testimony is not of that purely negative character which is entitled to no weight when opposed to affirmative testimony, nor is the effect of his testimony destroyed as a matter of law by the fact that it was contradicted by a witness called by himself.⁹⁵

A railroad company cannot be declared to have performed its full duty towards travelers upon the highways crossed by its railroad by reason of the fact that the rattling and rumbling of the engine were such as to be heard more than half a mile away.⁹⁶

The rule applicable to grade crossings that it is negligence in the railroad company not to give warning on approaching them has no application to under and over crossings of streets in a city.⁹⁷

In an action by a widow to recover damages for the death of her husband, where five witnesses for the company testify that lights were displayed, the bell rung and the whistle blown, and two witnesses for the plaintiff testify that they did not see the lights, nor hear the bell or whistle, it is reversible error for the court not to give adequate instructions as to the relative value of positive and negative testimony.⁹⁸

Safety Gates and Flagmen.

170. Safety gates are erected for the proper protection of the traveling public, and a city and a railroad company will not be enjoined from establishing a safety gate at a point where it will project over complainant's sidewalk, obstructing the view of goods in his store window, where there is no evidence to show that the discretion of the city and company has not been properly exercised.⁹⁹

Safety gates on a city street at a railroad crossing are a warning of the passing of trains, not only to vehicles, but to pedestrians; and if, in disregard thereof, a pedestrian pass a

95 *Jones v. Lehigh & New England R. R.*, 202 Pa. 81 (1902.)

96 *Faust v. Philadelphia & Reading Ry.*, 191 Pa. 420 (1899.)

97 *Farley v. Harris*, 186 Pa. 440 (1898.)

98 *Hess v. Williamsport & North Branch R. R. Co.*, 181 Pa. 492 (1897.)

99 *Rosenbaum v. Philadelphia & Reading R. R. & Reading City*, 19 Pa. C. C. R. 666 (1897.)

gate which is closed, in broad daylight, enters upon the crossing, and while watching one train is struck by another and killed, his contributory negligence will prevent recovery.¹⁰⁰

Safety gates which should be closed in case of danger, are, when opened, an invitation to the traveler on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances. This rule, however, does not apply to a person who reaches the place of danger by walking along the railroad.¹⁰¹

Plaintiff's husband went upon a roadbed of a railroad and walked thereon about a square to a public crossing. At this crossing he stood on one side of the tracks. The gates were not closed, and the watchman was in his box. A train was standing on the side of the street where he stopped. He started over the crossing, and as he stepped off the track where the train was standing to the next track, he was struck by a locomotive coming towards him on that track, and killed. It was a dark and rainy day, and the steam from the standing locomotive settled near the ground, obstructing the sidewalk. No signal was given by the train which struck the deceased. The court held that a non-suit was properly entered inasmuch as the deceased was in no sense a traveler from the street approaching danger, and about to exercise a right common to the public, that of crossing the railroad. Mr. Justice Dean said: "The watchman will not be on the lookout to warn him, nor will the gates be lowered to stop him. These safeguards are to keep people from going on the crossing on the approach of trains, not to warn them to get off. The deceased was bound to know the purpose of the gates and the watchman, and that they were not there to guard against danger to those using the crossing from the direction of outgoing and incoming trains."¹⁰²

An act done on a sudden emergency when life is apparently in peril, is not negligent even though it be mistaken.

100 *Sheehan v. Philadelphia & Reading R. R.*, 166 Pa. 354 (1895.)

101 *Matthews v. Phila. & Reading R. R.*, 161 Pa. 28 (1894); *Roberts v. Del. & Hudson Canal Co.*, 177 Pa. 183 (1896.)

102 *Matthews v. Phila. & Reading R. R.*, 161 Pa. 28 (1894.)

Thus a watchman at a railroad crossing cannot be charged with negligence in running in front of a horse and carriage approaching a highway to arrest the progress of the carriage, and to prevent its inevitable destruction and probable death of its occupants by an approaching train. If in consequence of the act of the watchman the horses take fright, and in turning throw the occupants from the carriage and injure them, the railroad company is not liable for their injuries.¹⁰³

A railroad company, in running its trains over a crossing, must exercise the care required by all the circumstances, and the failure to perform this is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances.¹⁰⁴

Where the gates at a railroad crossing are habitually kept closed, and only opened for the passage of vehicles, it is for the jury to say whether the closed gates are any warning to pedestrians, but where a person attempts to cross on foot at a time when the gates are closed without asking the gateman for information, and is run over by a train, his contributory negligence will warrant the court in entering a non-suit.¹⁰⁵

Where plaintiffs in attempting to drive across the tracks were induced to do so by a mistaken signal given by the flagman, and there was evidence which, although contradicted, tended to show that no bell was rung, or whistle blown and that the train was running at an unusual rate of speed, the case is for the jury.¹⁰⁶

Where the plaintiff approached a grade crossing over defendant's tracks at a time when the safety gates were lowered, and it appeared from the testimony of plaintiff and his witnesses that the horse was frightened by the escape of steam

103 *Floyd v. Phila. & Reading R. R.*, 162 Pa. 29 (1894.)

104 *Seifred v. Pennsylvania R. R.*, 206 Pa. 399 (1903.)

105 *Sheehan v. Philadelphia & Reading R. R.*, 15 Pa. C. C. R. 209 (1894);
3 Dist. 325 (1894.)

106 *Coleman v. Pennsylvania R. R.*, 195 Pa. 485 (1900.)

from the engine and the blowing of the whistle, it is not error for the court to charge that the fact of the safety gates being lowered and kept down for a period of time longer than that allowed by the city ordinance was not the proximate cause of the accident.¹⁰⁷

Plaintiff was killed at a grade crossing. It appeared from the evidence that the company had erected gates at the crossing but that at the time of the accident the gates were up and that no watchman was in charge of them, and that no whistle or bell was sounded by the approaching train.

Defendant alleged contributory negligence on the part of the plaintiff for failure to stop, look and listen, and two or three witnesses testified in support of the defendant's allegation. It was held that as the testimony in regard to plaintiff's stopping and listening was conflicting, and as the burden of proof was upon the defendant to show that plaintiff failed to stop, look and listen the court would not be warranted in withdrawing the case from the jury.¹⁰⁸

The fact that a railroad company, under certain conditions, maintained a crossing with safety gates, but without a watchman or gateman is sufficient in itself to warrant a jury in inferring negligence on the part of the railroad company.¹⁰⁹

Plaintiff, in approaching a crossing where his view was obstructed, nevertheless stopped, looked and listened. He testified that the safety gate was raised, and that the flagman signalled for him to cross; that he started, and at the first moment when a view of the track could be had, he saw a train coming rapidly towards him, so near to him as to make escape impossible. It was held, reversing a non-suit entered by the court below that the case was for the jury.¹¹⁰

A gateman at a railroad crossing owes a higher degree of care to an infant than to an adult, and while lowered gates are sufficient warning to an adult, he does not perform his full duty

¹⁰⁷ *Simmons v. Pennsylvania R. R.*, 199 Pa. 232 (1901.)

¹⁰⁸ *Hughes v. Delaware & Hudson Canal Co.*, 1 Lacka. 215 (1895); 4 Dist. 574 (1895.)

¹⁰⁹ *Hughes v. Delaware & Hudson Canal Co.*, 1 Lacka. 215 (1895); 4 Dist. 574 (1895.)

¹¹⁰ *Fennell v. Harris*, 184 Pa. 578 (1898.)

to an infant of tender years by merely lowering the gate; he should go further and give her the warning that it is proper to give to a child in the circumstances in which it is placed.

Plaintiff, a child of tender years, was injured by being struck by a train at a point where defendant's railroad crossed a street at grade. A flagman was stationed at the street and lowered the gates while a train on the west bound track passed; that as the train was passing a little girl of seven years came to the crossing, and as the gates did not extend over the sidewalk and were constructed in such a manner as to enable her to walk under them, she either came by the sidewalk or under the gate and stood by the flagman. When the train passed, she walked with him to the east track, where he stopped, but she kept on as if to cross it; he called her back, and she returned and stood near, facing him, and while thus situated an incoming train struck and seriously injured her. It was held that the plaintiff could recover. The court said: "Injury to a child is a misfortune without remedy in the absence of negligence on the part of him who caused the injury; but if the latter be guilty of negligence the heedlessness of danger by the child is no protection to him. The defendant did give notice to the public, that is to all capable of comprehending the notice, of the coming train; it gave no notice to children so young as to render them incapable of understanding it. When the flagman saw this child going into danger, notwithstanding the notice, it was his duty so far as he could do so with regard to his other duties to protect it."¹¹¹

Where a person who was about to cross a railroad track is suddenly confronted by a train, and steps back to a position which he thought safe, and the gateman regarding his position as perilous runs forward with a warning to get back, and his warning not being heeded attempts to force him back, and in the struggle the person is thrown under the approaching train, as the struggle is the proximate cause, there can be no recovery.¹¹²

It is not negligence *per se* for a railroad company not to

¹¹¹ Jones v. Harris, 186 Pa. 469 (1898.)

¹¹² McAnally v. Pennsylvania R. R., 194 Pa. 464 (1900.)

guard a crossing with a flagman or watchman. It is only one of the elements to be considered with others in determining whether the company is negligent.¹¹³

Crossing Over Sidings.

171. A person who crosses over a private siding at a public crossing without stopping, looking and listening, when he knows, or ought to know, that the siding is used for moving cars, is guilty of contributory negligence. Defendant was struck by a couple of cars which were being shunted over a crossing, just as he was about to step on the track. Before attempting to cross he stood talking at a point about fifty feet from the crossing, which was being used at the time in shifting cars. He walked from this point about one hundred and seventy-seven feet, and when within a few feet of the tracks he had an unobstructed view of the track for about two hundred feet. He was familiar with the street and crossing and the ordinary use of the siding, and had been for years. The cars which struck him were coming at a speed of about five or six miles an hour. It was held that the plaintiff was not entitled to recover.¹¹⁴

A railroad company is not negligent in shifting cars on to a siding, by shunting them in detached from the engine.¹¹⁵

Negligence of Driver of Vehicle Not Imputed to Occupants.

172. The negligence of the driver of a vehicle at a railroad crossing cannot be imputed to the occupants of the vehicle.¹¹⁶

A passenger in a street car approaching a grade crossing of a railroad, is not bound to look out and listen for approaching trains, and is under no duty to jump off the car in apprehension of a possible collision.

After a street car had stopped about seventy-five feet from the grade crossing, the watchman raised the gates, the car started, and when it reached the track a second locomotive following the one that had passed struck the car, and a passenger,

113 *Seifred v. Pennsylvania R. R.*, 206 Pa. 399 (1903.)

114 *Fox v. Pennsylvania R. R.*, 195 Pa. 538 (1900.)

115 *Fox v. Pennsylvania R. R.*, 195 Pa. 538 (1900.)

116 *Jones v. Lehigh & New England R. R.*, 202 Pa. 81 (1902.)

who was crippled in both feet, was injured. It was held that it was error for the trial court to charge that if plaintiff, by looking out, could have learned whether a locomotive was approaching, and could have gotten off before the collision, and did not do so, he would be guilty of contributory negligence, and could not recover.¹¹⁷

Evidence.

173. Although the weight of evidence as to whether proper notice was given of the approach of the train at the crossing may be with the defendant, yet the case must be submitted to the jury if three witnesses for the plaintiff testify that they were listening for some signal by bell or whistle of the approach of the train, and heard none.¹¹⁸

It is error to admit the opinion of witnesses to show that the crossing was dangerous, where the facts disclosed by the evidence give an intelligent description of the situation.¹¹⁹

Where there are two places at which a person approaching a grade crossing might have stopped, looked and listened, and the relative advantages and disadvantages of each place can only be described in a general way, it is proper for witnesses who are familiar with both places to supplement their description with their opinion.

The general habit of the public to stop, look and listen at one of the two places is persuasive evidence that that place is the right one.¹²⁰

A witness will not be permitted to testify as to the duties of railroad engineers at railroad crossings unless he is an engineer, or is qualified otherwise on the subject.¹²¹

117 *O'Toole v. Pittsburgh & Lake Erie R. R.*, 158 Pa. 99 (1893.)

118 *Kuntz v. New York, Chicago & St. Louis R. R.*, 206 Pa. 162 (1903.)

119 *Seifred v. Pennsylvania R. R.*, 206 Pa. 399 (1903.)

120 *Cookson v. Pittsburgh & Western Railway*, 179 Pa. 184 (1897); 27 Pitts. 394 (1897.)

121 *Born v. Philadelphia & Reading R. R.*, 198 Pa. 409 (1901.)

CHAPTER XXV.

NEGLIGENCE—FRIGHTENING HORSES.

174. Frightening Horses.

Frightening Horses.

174. The blowing of a whistle by a locomotive engineer is a lawful act; the emission of steam and smoke, where steam propels machinery is a necessary incident of the use of steam, and therefore not of itself unlawful. Both the blowing of the whistle and the escape of steam and smoke may be negligent, and, therefore, unlawful according to circumstances. If the circumstances themselves do not warrant an inference of unlawful use, the mere fact that an accident was caused by either is not sufficient to convict of negligence.

Deceased was driving on a country road near a deep cut of a railroad. A train had stopped at a station four hundred yards from the cut, and then started toward the cut. When the locomotive was in the cut, the vehicle on the highway was not visible to the engineer, and the railroad in front of him was visible only for a short distance, because of the curve. As the engineer approached the cut he blew the whistle loudly when entering, and when in the cut, smoke and steam in large quantities escaped; the deceased, being on the highway above, his horse took fright, either because of the whistle or the smoke or because of both. It was held that the plaintiff was properly non-suited.¹

The court will not reverse a verdict and judgment in plaintiff's favor, where it appears from his evidence that after he had crossed the tracks his horse became frightened by the escape of steam and backed into danger again; that the steam complained of was not the usual and unavoidable escape from

¹ Webb v. Philadelphia & Reading Ry., 8 Del. 413 (1902); 202 Pa. 511 (1902.)

a locomotive, but from a heating apparatus for passenger cars situated at or near the crossing, and that the steam hung about the point of escape to a greater degree than usual on account of the dampness and fogginess of the morning.²

Plaintiff averred that while he was driving a team of horses, defendant's engineer, on a dummy engine, sounded the whistle of the engine in an unusual and extraordinary manner as he approached plaintiff's wagon, which was on the other track, and that plaintiff's horses were thereby frightened and ran in front of the engine. It was held that the case was for the jury.³

Plaintiff, in approaching a railroad crossing, stopped about three hundred feet, at a point where she had a view of the tracks. She then proceeded. From a point on the highway, fifty-five feet from the tracks to the tracks, there was an unobstructed view of the railroad for a distance of five hundred feet. When plaintiff was about to go upon the crossing a hand-car approached and frightened her horse, causing him to turn sharply and upset the carriage. There was no collision between the hand-car and the carriage or horse. Several witnesses testified that the point where the plaintiff stopped was not the usual place for stopping. It was held that plaintiff was guilty of contributory negligence, and that a non-suit was properly entered.⁴

A turnpike company operated a steam passenger railway on its road. Plaintiff was sitting on top of a load of hay, driving along the turnpike, when he saw a dummy engine coming in the opposite direction. The horses became frightened, and plunging around broke the front wheels of the wagon and ran away, and plaintiff was thrown to the ground and seriously injured. He testified that his horses took fright when the dummy engine was about thirty or forty yards off; that he signalled the conductor and engineer to stop, but they disregarded him; smiled in his face and made no effort to shut off the escaping steam, the cause of his horses' fright. It was held that there

² *Mendenhall v. Philadelphia, Wilmington & Baltimore R. R.*, 202 Pa. 427 (1902.)

³ *Lott v. Frankford & Southwark Pass. R. R. Co.*, 159 Pa. 471 (1894.)

⁴ *Plummer v. New York & Hudson River R. R.*, 168 Pa. 62 (1895.)

was sufficient evidence of negligence on the part of the company to submit the case to the jury.⁵

Where cars were left standing at a crossing, leaving only a passageway about ten feet wide, and plaintiff's horse, in passing the first time, shied to one side, and in passing the second time, became frightened and threw and injured him, and the evidence was conflicting as to whether there was another and safer route, the case is for the jury.⁶

Plaintiff approached a grade crossing and found the safety gates down. While he was waiting a locomotive passed, and his horse becoming frightened by the whistle of the engine and escaping steam, pushed through the gate and plaintiff was thrown against the moving train and injured. It was held that as it was fairly left to the jury to determine whether or not the act of the engineer in blowing his whistle and letting off steam was in the line of his duty, a verdict and judgment for defendant would not be reversed.⁷

If a person, driving two wild, but not runaway, horses, is unable to control them, and they run upon the tracks of a railroad company, the horses are trespassers, and there can be no recovery.⁸

While deceased was driving a team of horses over a bridge across a railroad in a city, his team were frightened by the whistle of a locomotive sounded immediately under the bridge, causing them to run away. It was held to be proper to enter a non-suit as there was no evidence that the whistle was not sounded for a proper purpose.⁹

5 *Hanlon v. Philadelphia & West Chester Turnpike Road Co.*, 182 Pa. 115 (1897); 28 Pitts. 97 (1897.)

6 *Rusterholtz v. New York, Chicago & St. Louis R. R.*, 191 Pa. 390 (1899.)

7 *Simmons v. Pennsylvania R. R.*, 199 Pa. 232 (1901.)

8 *Billet v. York Southern R. R.*, 11 York 173 (1898.)

9 *Farley v. Harris*, 186 Pa. 440 (1898.)

CHAPTER XXVI.

NEGLIGENCE—TRESPASSERS.

175. Trespassers on Tracks.

176. Infant Trespassers.

177. Infant Trespassers on Trains.

178. Presumption as to Infant's Understanding.

Trespassers on Tracks.

175. Permission by a railroad company to the public to take water from a place on its right of way cannot be construed as a permission to anyone to walk on the tracks, and if a person, in the exercise of the right, is injured by needlessly walking on the tracks he is a trespasser, and cannot recover.¹

If a person, instead of taking a public highway which was about twenty feet from the railway and parallel thereto, walks for his own convenience down a switch which ran between the main railroad track and the highway upon the ends of the railroad ties and is struck by the front end of a passenger car which had been shunted from the main track by a locomotive, he is guilty of contributory negligence, and cannot recover for any injuries he received.²

The fact that a switch near a depot was used for years by persons in the neighborhood in approaching a depot in preference to walking on the highway leading to the same point does not impose a duty on the railroad company towards a trespasser.³

In *Loughrey v. Pennsylvania Railroad*,⁴ plaintiff was injured while walking along a street occupied by a double track railway on one of the main tracks, or so close to it as to be struck by a passing engine. There were no sidewalks on the

1 *Brague v. Northern Central Railway*, 192 Pa. 242 (1899.)

2 *Culp v. Delaware, Lackawanna & Western R. R.*, 9 Kulp 174 (1898.)

3 *Culp v. Delaware, Lackawanna & Western R. R.*, 9 Kulp 174 (1898.)

4 201 Pa. 297 (1902); affirming 31 Pitts. 438 (1901.)

street, but there was at each side of the main tracks room enough for a wagon to pass along. It was held that plaintiff was guilty of contributory negligence, and could not recover.

In *Kaseman v. Sunbury Borough*,⁵ where a pedestrian was killed by falling into an open space in an embankment erected longitudinally in a public street by a railroad company, Mestrezat, J., said: "If a person walking longitudinally along an embankment erected by a railroad company in a public street for railroad purposes is injured, it is immaterial so far as his right to protection from the railway company is concerned whether his injury was received from a passing train or by falling into an opening in the company's right of way. The railroad company, as against the pedestrian, had the exclusive use of the embankment, and when he entered upon it he became a trespasser. The railroad company owed no duty to the pedestrian to span an alley which passed through the embankment and under its tracks with a footwalk, or to guard it by the erection of barriers to prevent him from falling into it. It will not be presumed that a railroad company intends that a part of its right of way on an embankment in the street of a borough in actual use in the operation of its road should be appropriated longitudinally by pedestrians as a public thoroughfare."

Where a person in the night time goes upon a right of way of a railroad and attempts to approach a station by a path in the right of way used by the public, but obstructed at the time by reason of excavations for an undergrade crossing, and a new path is worn around the obstruction and the plaintiff wanders from the path on to a neighboring trestlework and is struck by a passing train, the railroad company is not liable.⁶

In an action to recover damages for death it appeared that the deceased was last seen alive about ten o'clock in the evening, walking on a street from a saloon toward a foot bridge which crossed the defendant's tracks. The guards of the bridge had fallen out of repair. The railroad cut which the bridge crossed was some fifteen feet in depth, and somewhat

⁵ 197 Pa. 162 (1900.)

⁶ *Grimmer v. Pennsylvania R. R.*, 175 Pa. 1 (1896.)

sloping at the sides. On the following morning the deceased's body was found on the track of the railroad about one hundred and fifty feet from the foot bridge. There was evidence that a fence had been constructed across the cartway of the street of the sidewalk of which the foot bridge was an extension. It was held that a non-suit was properly entered.⁷

When a railroad company has tracks on the cartway of a street, it is not trespass to drive a wagon on the tracks.

A railroad company occupied a portion of the street with a track laid in the same manner as street car tracks and paved in with Belgian blocks. There were two street car tracks also on the street, and the whole street was used by the public. Plaintiff, while driving a heavily loaded wagon, was forced by reason of street cars on the trolley tracks and wagons on one side of the street to turn his wagon so as to drive for a distance of about one hundred and forty feet with one wheel of his wagon between the rails of the railroad track. He continued to drive in this way for about four minutes, and was beginning to turn back towards the trolley track when his wagon was struck in the rear by a locomotive. It was held that it was error to refuse to take off a non-suit as plaintiff's contributory negligence and defendant's negligence were for the jury. Potter J., said: "The track was not raised above the level of the street, but was paved in with Belgian blocks. All this indicated that the street retained its character as a public highway for the use of all kinds of vehicles. Under these circumstances it could not be considered negligence in itself for a citizen to drive along the track. There is a manifest difference in the rule which should properly be applied to pedestrians who make an unfitting use of the street way in converting it into a footway and that which is appropriate to drivers of teams, who have a right to use with due care any portion of a public highway. Each has its appropriate purpose, the street for the use of the horse and vehicle, the sidewalk for the pedestrian. When either is found in the place set apart for the other it is manifestly out of the ordinary. In the present case plaintiff was making a proper and legitimate use of the street. The condi-

⁷ *Morgan v. Penna. R. R.*, 209 Pa. 25 (1904.)

tions under which the railroad company laid and used its tracks at that point made it incumbent upon it to operate its trains with due regard to the safety of other people who were also rightfully using the street at the same time. If the plaintiff was lawfully using the track in front of the approaching train, while it was his duty to give way to it and not obstruct its progress, yet he was entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad were bound to keep the train under proper control, and they had no right to run into plaintiff either upon the track or while in the act of leaving it. They were bound to use every reasonable effort to avoid a collision.”⁸

Infant Trespassers.

176. A father is not guilty of contributory negligence in permitting his boy, eleven years old, to go alone on the street on Sunday and to stroll along railroad tracks a square and a half from his home.⁹

Plaintiff, a lad of seven years, was seated with another boy on a truck in the yard of a lumber firm. The defendant company shifted near the truck a number of cars loaded with lumber, and in passing the plaintiff some of the lumber fell off the car and struck the truck, injuring the plaintiff to such an extent that his left leg had to be amputated. It appeared that the boy was sent to the mill where his father was at work that day on an errand, and that he had been habitually permitted from time to time to be in and about the works where his father was employed. The truck upon which the plaintiff was sitting was the property of the lumber firm, employers of plaintiff's father. It was held that although the plaintiff may have been dangerously near the track where he was hurt, at his age he is not presumed by law to be capable of estimating his danger, and the case should be submitted to the jury under instructions in regard to the negligence of the defendant, and the contributory negligence of the plaintiff.¹⁰

⁸ *Holt v. Pennsylvania R. R.*, 206 Pa. 356 (1903.)

⁹ *Enright v. Pittsburg Junction R. R.*, 204 Pa. 543 (1903); See s. c. 198 Pa. 166 (1901.)

¹⁰ *Holtzinger v. Pennsylvania R. R.*, 6 Dist. 430 (1897); 10 York 197 (1897.)

Where an infant, seven years old, walked on the track of a railroad company voluntarily and of his own accord, without the least necessity or occasion for so doing, without any permission to do so from any agent of the defendant and without walking upon any beaten track or upon any path or footwalk of any kind, he is a trespasser, and, if while in this position, he is struck by a train operated without any wantonness on the part of the company's employees he cannot recover for his injuries.¹¹

Infant Trespassers on Train.

177. A child ten years old, who while trespassing on a freight train is frightened by the shouts and threatening actions of a brakeman while in the discharge of his duties so that he jumps from the train while it is in rapid motion and is injured, may recover damages from the railroad company for his injuries.

Mestrezat, J., said: "The plaintiff's son was a trespasser upon the defendant's train. He had no right to be there and the brakeman would have been justified in expelling him. The defendant owed no duty to carry him in safety to his destination or to surround him with safeguards to protect him from falling from the train while in motion. He was not a passenger nor entitled to protection as such. The defendant was not required to stop its train to permit him to alight, nor to run the train at any particular speed to suit the boy's convenience or for his safety. No duties of this character devolved upon it. But conceding this to be true, it does not follow that the defendant, by its employees, could eject the boy from the train or cause him by fright or fear to leave the train while in rapid motion so as to endanger his life. The child being on the train and it running at rapid speed it became the duty of the defendant and its employees not to eject him. This duty arose from the circumstances. The failure to observe it was 'a want of ordinary care under the circumstances,' which is negligent. The brakeman knew the train was in motion, and hence saw the danger which must result from his conduct if the boy attempted to leave the train. His act was done there-

11 *Brague v. Northern Central Railway*, 192 Pa. 242 (1899.)

fore with full knowledge of the peril in which it placed the child. Consequently the defendant, through its employee, disregarded a plain duty, which resulted in the painful and serious injury of the plaintiff's son. The simple proposition to be determined here is the right of the defendant, by its employee, to endanger the life of a child of tender years by compelling him to alight from a freight train which is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury therefore is directly attributable to the negligent act of the defendant's employee in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent and should answer for its conduct."¹²

Where a boy, seventeen years of age, is injured in endeavoring to climb upon a freight train and is taken to a private house in the immediate vicinity, and from there the boy sends messengers to his father's house and to the house of his father's physician, both of which are one or two miles distant, with muddy roads intervening, and before the messengers return the crew of the freight train, against the protest of the boy, take him first to a station, where the railroad company's physician resides, and from there to a hospital, and it appears that the seriousness of the boy's injuries called for great haste, the railroad company cannot be held liable in damages for a false imprisonment, as these acts of their employees were acts outside the scope of their employment.¹³

Presumption as to Infant's Understanding.

178. An infant, twelve years old, will not be presumed as a matter of law to have sufficient capacity to be sensible of danger and to avoid it. His contributory negligence is a matter to be passed upon by the jury.¹⁴

¹² *Enright v. Pittsburg Junction R. R.*, 198 Pa. 166 (1901.)

¹³ *Ollet v. Pittsburg, Cincinnati, Chicago & St. Louis Ry.*, 201 Pa. 361 (1902.)

¹⁴ *Kelly v. Pittsburg & Birmingham Trac. Co.*, 204 Pa. 623 (1903.)

CHAPTER XXVII.

NEGLIGENCE—INJURIES TO EMPLOYEES.

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| 179. Suitable Tools and Appliances. | 190. Employment of Incompetent Servants. |
| 180. Car Inspection. | 191. Fellow Servants — General Rule. |
| 181. Safe Roadbed. | 192. Who Are Fellow Servants. |
| 182. Presumption of Negligence—Evidence. | 193. Who Are Not Fellow Servants. |
| 183. Risk of Employment. | 194. Cases Under the Act of April 4, 1868. |
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Suitable Tools and Appliances.

179. A railroad company is required to provide for its employees, not perfect or even the best of appliances, but such as are reasonably suitable for the purpose of carrying on the business about which they are engaged. When this has been done, the employee assumes the risk of injury from such ordinary dangers as necessarily and usually accompany his employment, and from any unusual dangers incident to said employment, of which he had notice and to which he voluntarily exposes himself.¹

While the employer owes his employee the duty of furnishing such machinery and appliances as in the ordinary usage of the business engaged in, are safe and suitable and of keeping them in such condition, a verdict and judgment cannot be entered against him at the suit of an injured employee on a guess that he was negligent, or on a mere theory of specific negligence without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can be submitted to a jury.

In an action to recover damages from a railroad company,

1 *Schlemmer v. Buffalo, Rochester & Pitts. Ry. Co.*, 11 Dist. 677 (1902.)

the specific act of negligence charged against it was that it knowingly supplied a locomotive with an old, defective and dangerous boiler, which exploded and caused the death of appellee's husband. After the explosion parts of the boiler were varnished to preserve them and stored away by the railroad company. When the case was called for trial, defendant presented to the court an affidavit stating that the portions preserved were in the same condition as they were in immediately after the explosion. Two experts for plaintiff, who examined the portions preserved testified that the iron was in poor condition, thin and unsafe, wasted away and corroded; that it had wasted away from its original thickness of $\frac{3}{8}$ of an inch to $\frac{1}{8}$ of an inch and was not thicker than a knife blade. One of the experts testified that the explosion was caused by the unsafe condition of the boiler. It was held that the evidence was sufficient to submit the question of defendant's negligence to the jury.²

In an action for damages against a railroad company it appeared that plaintiff was employed by a furnace company to unload ore from the cars of a railroad company. The railroad company contracted with the defendant to haul the cars containing the ore from its own tracks, distant about a half mile, to the tracks of the furnace company, which were constructed on a trestle 18 or 20 feet high at the upper end and inclined slightly towards the stock house of the furnace company, where the plaintiff was to allow the cars to drop, one by one, by gravity to the stock house of the furnace company, to be unloaded. Plaintiff and two fellow workmen uncoupled one of these cars for the purpose of running it in this manner to the stockhouse, when the other two left standing on the track came down and collided with the first and caught the arm of the plaintiff. It was held that as there was not positive evidence to show that the brakes were defective, and as there were no contractual relations existing between plaintiff and defendant whereby defendant was bound to furnish the plaintiff with safe appliances with which to perform his work, a non-suit was properly entered.³

² *Marsh v. Lehigh Valley R. R.*, 206 Pa. 558 (1903.)

³ *Anderson v. Pittsburg & Lake Erie Ry. Co.*, 5 Dist. 400 (1896); 26 Pitts. 470 (1896.)

A railroad company is not liable for personal injuries to an employee alleged to have been caused by the use of a particular appliance where it appears that the particular appliance in question was one of several different kinds all in common use at the time of the accident.⁴

A railroad company is bound to place on a freight car such car handles, ladders or safe guards as are in common, ordinary use upon railroads.⁵

A sill of a tender of a locomotive is the place where the coupling is attached for pulling the train and it is required to have strength to resist the tension of that operation, but there is nothing in its purpose or use to require that it shall be strong enough to resist the force of a collision. It would be error for the court to permit the jury to guess that if the sill had been stronger, the injury to the plaintiff would have been less, or would not have happened at all.⁶

A railroad company although bound to furnish reasonably safe appliances for its employees, is not liable if its employees fail to exercise reasonable care and caution in performing their work.

Plaintiff, a government mail agent, while stooping down to select the proper pouch for delivery was thrown by the movement of the train rounding a curve, out of the side door of the car; he grasped the bar of the mail catcher, which swung outward, there being no safety pin in the end of the catcher to secure the rod in place and he passed under it and fell to the ground and was injured. It appeared that the safety rod used for the door of the railway car, about three feet from the floor, was fast in the socket and could not be released, in order to be placed in position across the door, by the plaintiff by pulling or kicking against it. The evidence showed that the bar fitted tightly and usually had to be dislodged with some instrument in the car, but that plaintiff looked for nothing with which to pry it away. It further appeared that the lower section of the door was open, although plaintiff could have

⁴ *Dooner v. Del. & Hudson Canal Co.*, 171 Pa. 581 (1895); 26 Pitts. 227 (1895.)

⁵ *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

⁶ *Brommer v. Philadelphia & Reading Ry.*, 205 Pa. 432 (1903.)

performed his duties if the door had been shut. A motion to strike off a non-suit was overruled.⁷

Plaintiff, an employee of defendant company, was injured by an accident caused by failure to use a connecting bar instead of a link in coupling the cars, one of which jumped the track and struck the plaintiff. The court held that plaintiff was not entitled to recover as the injury complained of was caused by the negligence of plaintiff's co-employee. Shafer, J., said:

"The controlling question seems to be whether the cause of the injury was a failure on the part of the defendant to furnish connecting bars, or the negligence of the crew of the train by which the plaintiff was hurt in not finding some of the bars which the plaintiff shows were in the yard and used in making up the trains. As the bars were not fixed appliances, but in the nature of portable tools and such as the employees of the company were expected to hunt for in the yard and along the tracks and as there were in the yard several times as many as were needed, and there is no evidence that they were in use, it seems to us that it was the duty of the plaintiff's co-employees who made up the train and operated it, to hunt for the bars until they found them, and then use them, and that to attempt to run the cars without them and thus expose the defendant's property and the lives of themselves and their co-employees to great danger was negligence; if so, the plaintiff was injured by the negligence of a co-employee and cannot recover."⁸

A railroad company is not liable under the Act of Congress of March 2, 1893, which requires a full and complete equipment of air-brakes, for a collision where the evidence discloses that the accident was caused by the negligence of the engineer, and could have been avoided, even if the train had been fully equipped with continuous power or air brakes. In such a case the failure on the part of the railroad company to comply with the Act of Congress, was not the proximate cause of the injury. The said Act of Congress simply relieves the em-

⁷ *Martin v. Philadelphia & Reading Ry.*, 200 Pa. 603 (1901); affirming ⁴ Dauph. 89 (1901.)

⁸ *Miller v. McKeesport Connecting R. R.*, 33 Pitts. 31 (1902); affirmed 205 Pa. 60 (1903.)

ployee, if he continues in his employment with knowledge that its provisions are not being fully complied with from the presumption that he assumes the risk *thereby occasioned* if he be injured by such engine, car or train; but if the injury sustained be not occasioned by the non-observance of the statute or its non-observance be not the proximate cause thereof, then no liability therefor falls upon the company.⁹

There is no liability imposed on a railroad company for an injury to an employee in coupling a steam shovel car, which was not equipped with automatic couplers, to another car, by the Act of Congress of March 2, 1893, requiring all cars used in interstate traffic to be equipped with automatic couplers, where the accident was caused by the negligence of the injured employee. A steam shovel car is not a "car" used in interstate commerce within the act; but even if such a car, as shown to be operated and equipped, could be construed to come under the provisions of the act, there could be no recovery because of the negligence of the employee.¹⁰

Car Inspection.

180. Where a railroad company receives a car from another railroad, it is bound to make such inspection of the car as the nature of the transportation requires, and if it pass and haul cars faulty in construction or dangerously out of repair, it is answerable to any injuries that may thereby result to its own employees. Section 1, Article 17, of the Constitution, which requires railroad companies to receive and transport cars loaded or empty without delay or discrimination of another connecting railway imposes no duty upon a railroad company to take cars of another road not in a condition for transportation or not provided with the appliances which ordinary care requires for the reasonable safety of train crews in properly handling them.

In an action by a brakeman against his employer, a railroad company, to recover damages for personal injuries, the evi-

⁹ *Snyder v. Pennsylvania R. R.*, 11 Dist. 609 (1902); affirmed in 205 Pa. 619 (1903.)

¹⁰ *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 11 Dist. 677 (1902.)

dence showed that the rules of the company provided that the inspector of cars from other railroads should see that roof-grab irons, ladder handles, sill steps, ladder sides and rounds on cars were all sound and securely fastened to the body of the car by either bolts or lay-screws. No instruction was given to reject the car if these appliances were not on the car. There was also evidence that the inspector was young and incompetent. It was held that the question of defendant's negligence was for the jury.¹¹

The rule which requires railroad companies to inspect cars received from other companies and to see that they are in good and safe condition for their employees to handle, does not apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight, even though the sidings of such person or company may be extensive in number and great in length.¹²

A railroad company is bound to make such inspection of cars received from other roads as the nature of the transportation requires. If it pass and haul cars faulty in construction or dangerously out of repair, it is answerable to its own employees who are thereby injured. This rule applies to a case where the car negligently inspected belonged to a private owner, was in the owner's yard at the time of the accident, and was under the control of the owner's superintendent, who directed what cars should be shifted and where they should be placed.¹³

Safe Roadbed.

181. Where a conductor was killed in an accident caused by a broken rail, it is not error for the court to refuse to submit the case to the jury, where the plaintiff's theory that the break was caused by a rotten tie, is not supported by any definite testimony that the ties were rotten at the place of the break; neither is it error for the court to refuse to permit plaintiff to show that the railroad company had allowed its road-

11 *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

12 *McMullen v. Carnegie Bros. & Co.*, 158 Pa. 518 (1893.)

13 *Elkins v. Pennsylvania R. R.*, 171 Pa. 121 (1895); 26 Pitts. 205 (1895.)

way and its rails to fall into bad repair generally, and at places other than that of the accident.¹⁴

Plaintiff, a brakeman, while riding on an engine in defendant's yards, was injured by reason of the engine running off the track in rounding a curve. Plaintiff alleged that the accident was due to defective tracks. This defect complained of was a lack of solidity, which had existed for sometime at and near the point where the accident occurred. The tracks were laid upon a cinder bed, which caught fire and burned or smoldered away under the surface; this seemed to change the character or condition of the cinders and weakened the cohering power of the ballast or support under the rails, which in turn brought about an uneven lowering of the track. The track was also curved just there and when rounding the bend the swaying of the engine caused the rail on one side to sink so that the result was to increase and emphasize the swinging of the engine and cars. This was not so extreme, however, as to cause the place to be considered impassable nor did it appear from the testimony that an engine had ever before left the track at that point. It was held that the court could not say as a matter of law, that plaintiff was guilty of contributory negligence. The case was submitted to the jury and a verdict and judgment for plaintiff was sustained.¹⁵

A railroad company owes no duty to the public or its employees to maintain a safe footway the length of its roadbed.

Plaintiff, a brakeman, while coupling cars on a side track of defendant company had his right arm crushed. There was an open hole or drain, eight to ten inches deep, between two ties at the point where he was injured and in attempting to perform his duty of coupling he fell and in falling he threw up his arm, which was caught between the bumpers and crushed. Averring negligence on the part of the company in leaving thus exposed a dangerous hole of which he was ignorant, he brought suit for damages. It was held that he could not recover. The Court said:

"In our State it has been consistently held that the railroad company owes no duty to the public or its employees to main-

14 *Briggs v. East Broad Top R. R. & Coal Co.*, 206 Pa. 564 (1903.)

15 *Hammer v. Pressed Steel Car Co.*, 204 Pa. 594 (1903.)

tain a safe footway the length of its roadway; that it is reasonably safe to the employee without it. In *R. R. Co. v. Schertle*, 97 Pa. 455, the deceased, a brakeman, lost his life by slipping into a hole between the ties where there was no ballast. The court said: 'There certainly was no duty to ballast the track for the safety of its employees and except perhaps at a crossing no such duty to the public.' See also *Costello v. R. R. Co.*, 32 W. N. C. 134. The same consistency in ruling obtains in New York State. We prefer to follow our own and the New York rule because we consider it sound in reason and that it opens up no wide field of guessing or conjecture on the part of the jury. In Arkansas, Texas and some other States, the opposite rule is held; the burden of proof in case of accident of this nature is on the company to negative negligence from the mere fact of an opening between the ties, whereby the brakeman was injured. To this rule we do not assent. Nor does the fact that the accident was upon a side track or yard at all change the rule. We think, on the undisputed facts, the plaintiff had disclosed no negligence as to him which would support a verdict."¹⁶

The absence of a signal at a switch is immaterial where there was no evidence that its absence caused the accident, and the evidence shows that the switch was the kind in general use.¹⁷

Under the Act of April 9, 1868, relative to the liability of railroad companies for the loss of certain animals on failure to fence along its road, a railroad company is not liable to its employees.

"The act in no wise affects the running or operating of the road. The company, if it fails to fence, is liable for any loss of horses, cattle, sheep and swine injured or killed upon said road. The provisions of the act imposing duties in contravention of the common law rights of the company cannot be enlarged beyond the specific purpose stated in the Act, and cannot restrict the rights of the company as between employer and employee, nor be construed as imposing greater duties relative thereto than the well established law recognizes and im-

¹⁶ *Kerrigan v. Pennsylvania R. R.*, 194 Pa. 98 (1899.)

¹⁷ *Foreman v. Pennsylvania R. R.*, 195 Pa. 499 (1900.)

poses. The absence of a fence is so obvious that all trainmen are presumed to have notice of it and to assume any risks involved because of the want of it."¹⁸

Presumption of Negligence—Evidence.

182. The mere fact that an accident happened does not raise a presumption that the company was negligent, as it would in the case of a passenger or stranger. Before any recovery can be had by the person injured, he must show affirmatively some negligent act and trace the injury to that act as the proximate cause of it.¹⁹

Widows of an engineer and fireman sought to recover damages for the death of their husbands, which occurred in a collision between the engine upon which they were employed and another engine.

Five separate causes were alleged for the accident from which negligence might be alleged, but there was no evidence that any one of them was the specific cause of the accident. The court on appeal refused to take off a non-suit.²⁰

Risk of Employment.

183. The risks or dangers assumed by an employee are those which are incident to his employment, those which are known to him, and those which are obvious and apparent.²¹

A person who is employed by a railroad company to clean the tracks after a snow storm in the vicinity of moving trains is engaged in a dangerous occupation, and he assumes the risk of his employment, and must keep himself out of manifest and unnecessary exposure to danger.²²

A railroad company cannot be charged with negligence in making up a long train of empty freight cars so that they parted and caused a collision, where there is no evidence that

¹⁸ *Snyder v. Pennsylvania R. R.*, 11 Dist. 609 (1902); affirmed in 205 Pa. 619 (1903.)

¹⁹ *Martin v. Philadelphia & Reading Ry.*, 200 Pa. 603 (1901); affirming 4 Dauph. 89 (1901.)

²⁰ *Price v. Lehigh Valley R. R.*, 202 Pa. 176 (1902.)

²¹ *Ortlip v. Philadelphia & West Chester Trac. Co.*, 9 Dist. 291 (1900); affirmed in 198 Pa. 586 (1901.)

²² *Nye v. Pennsylvania R. R.*, 178 Pa. 134 (1896.)

the train was not made up in the usual manner, and the testimony of an engineer tends to show that the parting of long trains was one of the ordinary risks of the business against which he was constantly required to guard.²³

Engineers.

184. Plaintiff's husband was killed while working as a locomotive engineer on one of defendant's trains. The accident was caused by a subsidence of the track, due to the sinking of the land over mine workings from which the coal had been removed. Plaintiff was running his train at the time of the accident at the rate of about twenty-five miles an hour. There was evidence which was uncontradicted that three weeks prior to the accident a notice had been placed on the bulletin board that all trains running over a specified territory should run slow on account of the track settling, which meant that the trains should be run at the rate of eight or ten miles an hour. Deceased's fireman testified that the deceased had a copy of the order in his possession and that he had showed it to him. The court held it to be error to submit the case to the jury, as from the evidence it clearly appeared that his death was the direct and proximate result of his voluntary disregard of an order of the railroad company, made specially to avoid the very danger from which the accident resulted, and that under such circumstances there could be no recovery.²⁴

In an action to recover damages for the death of a locomotive engineer against a railroad company which owned the tracks upon which the deceased was running a train for another company by whom he was employed, it appeared that the deceased, who was the engineer of the Philadelphia and Reading Railroad Company's fast express train known as "The Royal Blue," from Jersey City to Philadelphia, was killed at Bayonne City by his train running into a wreck of empty coal cars. The coal train, which consisted of a large number of coal cars, started for Jersey City somewhat ahead of the express train. At Bayonne a flagman, employed by the defendant company, signalled the coal train to stop. The sig-

23 *Thomas v. Central R. R. of New Jersey*, 194 Pa. 511 (1900.)

24 *Lonzer v. Lehigh Valley R. R.*, 196 Pa. 610 (1900.)

nal was obeyed, with the result that the rear of the train, which had parted, piled up upon the forward cars, and a number of cars were precipitated upon the adjacent track. There was no evidence why the flagman gave the signal to stop the train. It was held that the question whether the signal by the flagman was negligently given and whether or not it was the proximate cause of the accident were questions for the jury.²⁵

A railroad company is not liable for injuries sustained by one of its locomotive engineers which were caused by his head coming in contact with the side of a bridge, while he had his head out of the cab window to watch his train, where it appears that he had frequently passed the bridge, although on narrower engines and that the danger from protruding the head too far was plainly obvious.²⁶

A railroad company owes no duty to a skilled and experienced engineer to instruct him of the dangers of a locomotive which he is set to operate where the new locomotive is of the same general character as the one to which he had been accustomed.

Plaintiff, a locomotive engineer, was injured while leaning out of the cab window by his head coming in contact with the ironwork of a bridge. He was familiar with the road and the bridge at which he was injured, having been in the employ of the road, as brakeman, fireman and engineer for about twenty years. The track of the road was in good repair, and the bridge of suitable width and had been in constant use for fifteen years. At the time of the accident the defendant company had entered into an agreement to permit certain trains of another company to run over its road, and plaintiff was assigned to instruct the engineer of one of these trains as to the peculiarities and dangers of the road. It appeared that the width of the cab of the engine upon which plaintiff usually ran was eight feet and six inches, while the width of the cab of the engine on which he was acting as pilot was nine feet. The space between the side of the cab and the ironwork of the bridge was about twenty inches, which would be somewhat re-

²⁵ *Thomas v. Central Railroad of New Jersey*, 194 Pa. 511 (1900.)

²⁶ *Fulford v. Lehigh Valley R. R.*, 185 Pa. 329 (1898.)

duced by the swaying motion of the engine when pulling the train. Plaintiff was not advised of the increased width of the cab. It was held that plaintiff was not entitled to recover.²⁷

A locomotive engineer who has full knowledge that the train on which he is working is sent out to remove snow drifts from cuts, assumes the risk of such employment, and if he is killed by the derailment of his engine running into a snow drift in a deep cut, his widow and children are not entitled to recover damages for his death.²⁸

A locomotive engineer had been in the employ of his company for over ten years before he was injured. Sometime prior to the accident the oil pipe of plaintiff's locomotive had burst at a point where it came out from under or through the jacket of the boiler near the smoke stack. This pipe was used to carry oil from a reservoir inside of the cab to the valve upon the steam chest. In consequence of it having burst the oil ran out and the valve was not supplied with oil, but in order so to supply it the appellant while the engine was drifting down grade, having gone through the window of the cab, stepped upon the narrow footway alongside of the boiler, walked to a point near the steamchest and therestooing down, with a hand oiler poured the oil into the valve. Having done so he returned to the cab and just as he reached its entrance his foot slipped, and he fell forward into it, striking the water gauge inside of the cab. By the blow thus given the gauge was thrown open, causing boiling water and superheated steam to pour into appellant's shoe and seriously injured him by burning his foot. The injury so received was not in consequence of any defect of the pipe. He had finished the oiling of the valve and upon his return to the cab, slipped at its entrance, where he struck the water gauge and knocked it open. The heated water and superheated steam scalded his foot and this caused the injury. It was held that the defective pipe was not the proximate cause of the accident, and that binding instructions for defendant were proper.²⁹

27 *Bellows v. Pa. & N. Y. Canal & R. R. Co.*, 157 Pa. 51 (1893.)

28 *Derr v. Lehigh Valley R. R.*, 158 Pa. 365 (1893.)

29 *Douglass v. New York Central & Penna. R. R.*, 209 Pa. 128 (1904.)

Brakemen.

185. A brakeman was injured while he was uncoupling an ordinary box freight car from the tender of an engine. It appeared there were two iron steps, a brake and a wheel upon the middle of the end of the car, but no ladder, steps or handholds at or near the corners of the car. It appeared that the iron steps on the car were so constructed that they could be used as handholds, and that they were sufficient if actually used. The plaintiff admitted that in performing the act of uncoupling cars from the tender he did actually use one of the steps while he stooped down to reach the coupling pin. After pulling out the pin he stood erect on the narrow ledge on the end of the car with his back against the car. He then let go his hold of the iron step attached to the middle of the end of the car, stepped to the right side of the car, gave a signal to the engineer, and then in endeavoring to return to the iron step, took one step towards it, and was taking the second, when he lost his balance and fell off the car and was injured. The brakeman alleged that the company was negligent in not having handholds at or near the corner of the car. The evidence showed that cars equipped like the one on which the accident occurred were in common use, and that there was no one standard of appliances for the use of brakemen upon freight cars. It was held that the plaintiff was not entitled to recover.⁸⁰

In an action by a brakeman against a railroad company to recover damages for personal injuries, resulting from the fact that a freight car in which he was working had no grab iron or ladder, it is error for the court to permit witnesses to state that in their opinion the car was unsafe. As a common freight car is not a complicated machine, the jury can determine for themselves whether it is safe or not.⁸¹

It is not negligence for a brakeman to sidetrack a car by a "flying switch," although such an act is a highly dangerous one, where the exigency requires the sidetracking to be quickly

⁸⁰ *Dooner v. Delaware and Hudson Canal Co.*, 171 Pa. 581 (1895); 26 Pitts. 227 (1895.)

⁸¹ *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

completed so as not to encroach on the track when approaching passenger trains are due.³²

A brakeman cannot be charged with contributory negligence where it appears that in making a flying switch he grooved a coupling pin of a freight car, signalled the engineer, and turned to seize the grab-iron or ladder, when he first discovered that the car had neither, and fell to the track.³³

Where the death of a brakeman on one train is caused not by an unsafe schedule or defective rules, but by the reckless disregard of clearly defined and well understood duties by the engineer of another train, the widow of the deceased is not entitled to recover damages from the railroad company, inasmuch as the accident was caused by the negligence of a fellow servant.

A special order was given to the engineer of a passenger train which was late, to run to his destination two hours late. The evidence showed that this order was to be read in connection with the general rules of the company, and meant that the train would have a track clear of all freight trains, but that it must run with reference to the schedule of all passenger trains. The engineer neglected the order and ran into the passenger train ahead of him which was running on schedule time. A brakeman on the latter train was killed. It was held that the brakeman's widow could not recover from the company.³⁴

Where a brakeman was killed by the derailing of a train which was running on a defective roadbed, the case is for the jury where the evidence for the defendant showed that before the accident the deceased was not in his proper place, but was sitting on a brake-wheel, a place of danger, but it was not clear that at the actual time of the accident the deceased was in this dangerous position.³⁵

Where a brakeman was injured in a collision with other cars while operating a defective brake, and his evidence showed that after he had made several revolutions of the wheel he dis-

32 *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

33 *Dooner v. Delaware & Hudson Canal Co.*, 164 Pa. 17 (1894.)

34 *Kenney v. Baltimore & Ohio R. R.*, 166 Pa. 60 (1895); 25 Pitts. 316 (1895.)

35 *Wilson v. Pennsylvania R. R.*, 177 Pa. 503 (1896.)

covered that the chain was broken, but failed to show how or when the defect occurred, or that the car was in a defective condition when it left the inspection yard a short time before the accident, a non-suit is properly entered.³⁶

Plaintiff while in the service of defendant as a rear end brakeman on one of its through freight trains, was injured while in the performance of his duty in a space between the inner and outer rails of two sidings. It appeared that this space was insufficient to allow him to properly discharge his duties and he testified that although he had been in the employ of the road for a number of years, running on the division upon which the accident occurred, he had no knowledge of the insufficiency of the space. It was held that the case was for the jury.³⁷

In an action against a railroad company to recover for the death of a brakeman in the employ of another company, caused by an alleged defective switch, a non-suit is proper, where the only evidence of negligence was that at a period two weeks or more before the accident the rails were not close together, and there was no evidence that the defect continued, or that the defect caused the accident, which could be attributed to several causes, for none of which defendant was liable.³⁸

A brakeman was killed while engaged in making a coupling between a car and a steam shovel or construction car. He had been warned of the danger prior to the accident, and was twice instructed as to the manner of operation. Contrary to his instructions he raised his head too high and was struck and killed. It was held that a non-suit was properly entered.³⁹

Firemen.

186. A train while lying in a yard was given an order to "wild cat," which gave it the right of way outside the yard,

36 *Dickerson v. Central R. R. of New Jersey*, 189 Pa. 567 (1899.)

37 *Vorhes v. Lake Shore & Michigan Southern Ry.*, 193 Pa. 115 (1899.)

38 *Savitz v. Lehigh and New England R. R.*, 199 Pa. 218 (1901.)

39 *Schlemmer v. Buffalo, Rochester & Pittsburg R. R.*, 207 Pa. 198 (1903.) In this case it was not decided whether the Act of Congress of March 2, 1893 (27 U. S. Stat. At Large 531) in regard to the use of automatic couplings on cars employed in interstate commerce, had any applicability in actions for negligence in the courts of Pennsylvania.

subject only to the requirement to keep a look out for regular scheduled trains. While inside the yard the train was to be kept under such control that it could be stopped within half the distance that the engineer could see along the track. While the train was moving near the limit of the yard, the engineer not seeing, on account of steam escaping from a passing engine, an irregular excursion train backed up on the same track, ran into the excursion train, and his fireman was injured. The evidence was conflicting whether the collision occurred inside or outside the yard. In an action by the fireman against the railroad company, it was held that the case was for the jury.⁴⁰

Trackmen.

187. A railroad company has a right to run its trains on tracks that suit best the convenience of its business, and it is not the duty of telegraph operators to notify its trackmen as to the running of trains. It is the duty of the trackmen to watch the tracks and report their condition to the company, and he must use his eyes to protect himself against all trains, no matter on what track they may be run; if he fails to do this and is killed because of this neglect, his representatives cannot recover for his death.⁴¹

A trackman engaged in repairing tracks in or near a tunnel is bound to take notice of the danger incurred and assumes all the risks arising from such employment as are incident thereto.

Where a track repairer had been employed in a tunnel through which trains had been running only on one track, but was notified that traffic would be resumed as usual on both tracks, and was killed by a west-bound train on an east-bound track, there can be no recovery.⁴²

An employee who undertakes the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious the danger of which he has had an opportunity to ascertain. Plaintiff, a track repairer in the employ of the defendant company, was engaged with several others in repairing the tracks in the company's yards.

40 *Goodman v. Del. & Hudson Canal Co.*, 167 Pa. 332 (1895.)

41 *Heiseman v. Pennsylvania R. R.*, 19 Lanc. 321 (1902.)

42 *Sanker v. Pennsylvania R. R.*, 205 Pa. 609 (1903.)

There was a freight train with a locomotive attached on a siding at the east of the track where the plaintiff was working. In order to avoid a passenger train which was approaching on the track on which he was engaged, plaintiff jumped in the direction of the siding upon which the freight train stood, and in some way got under one of the cars and was injured in such a manner by the starting of the train that one of his legs had to be amputated. It was held that the railroad company was not liable.⁴³

Car Inspectors.

188. A car inspector who goes under a standing car on a switch at a time when he knows a train is usually run on the switch, and makes no inquiry as to whether the train had been placed there, is guilty of contributory negligence, and if he is injured by the running of a train on to the switch he cannot recover damages from the railroad company for his injuries.⁴⁴

Where a car inspector enters upon his employment knowing that a signal lamp and flag were necessary to his safety, and that these had not been furnished him, he assumes the risk of the danger by continuing in the employment without the lamp and flag.⁴⁵

Deceased was a car inspector in a yard jointly used by the company which employed him and by the defendant company. While he was engaged on an afternoon of a clear day in the inspection of some cars in the yard, a coal train belonging to the defendant was backed in on the same track and collided with the cars which he was inspecting and he was caught between the bumpers and killed. A rule of the two companies provided that "a blue flag by day and a blue light by night, placed on the end of a car denoted that car inspectors were at work under or about the car and that the car must not be coupled to or moved until the blue signal was removed by the car inspectors." The evidence tended to show that the de-

⁴³ *Palko v. Central R. R. of New Jersey*, 9 Kulp 550 (1900.)

⁴⁴ *Marean v. New York, Susquehanna and Western R. R.*, 167 Pa. 220 (1895.)

⁴⁵ *Marean v. New York, Susquehanna and Western R. R.*, 167 Pa. 220 (1895.)

ceased placed a blue flag on the railroad track at a sufficient distance from the car under which he was at work to protect him if it had been seen by the conductor of the train which struck him. The court refused to direct a verdict for the defendant and held that the question of deceased's contributory negligence and defendant's negligence was for the jury.⁴⁶

Car Repairers.

189. A car repairer employed in the repair yard of a railroad company assumes the risk of injuries arising from the negligent dropping in of cars on the track where he is from time to time employed.⁴⁷

A tinner in the employ of a railroad company was sent to a siding several miles distant from the railroad shop to repair the roof of a passenger car on the siding. The siding was ordinarily used for freight cars which were much smaller and lower than passenger cars. The tinner was informed that the car would not move for some time, and that within this time he could do the required work. He had been on top of the car but a short time when an engine was attached to it. It was drawn rapidly forward, and he was struck by a wire stretched across the tracks and seriously injured. When the car moved he arose from his work and walked forward on the upper deck to learn the cause of the movement. As he approached the front of the car the smoke and cinders from the engine came directly against his face, and to avoid them he turned his head to one side, and was struck by the wire almost immediately afterwards. The wire, which was used as a guy to support a pole, was stretched across the track at a height of nineteen feet and one inch, and the top of the upper deck of the car was fourteen feet and four inches above the tracks. The main roof was some seventeen inches lower. It was held that the case was for the jury.⁴⁸

Employment of Incompetent Servants.

190. A railroad company which retains in its service an

⁴⁶ *Werst v. Lehigh Valley R. R.*, 190 Pa. 482 (1899.)

⁴⁷ *Peterson v. Pennsylvania R. R.*, 195 Pa. 494 (1900.)

⁴⁸ *Stoltenberg v. Pittsburgh & Lake Erie Railroad*, 165 Pa. 377 (1895);
²⁵ *Pitts.* 295 (1895.)

habitually careless man renders itself liable to its other employees for the results of his negligence. Thus where a railroad company has retained for a long time a flagman who had been habitually negligent, a conductor who was injured by the negligence of the flagman, may recover damages from the railroad company.⁴⁹

Where a brakeman was injured by the negligence of the conductor of a log train upon which he was employed and the evidence tended to show that the conductor was incompetent, and that his incompetency was known, or ought to have been known to the defendants, the case is for the jury and a verdict and judgment for the plaintiff will be sustained.⁵⁰

Where in an action to recover damages for injury resulting from the negligence of a fellow servant, an engineer in backing a shifting engine into a car in which plaintiff was working, evidence that the engineer was drunk on three different occasions is not sufficient to charge the company with negligence in employing him or retaining him where it appeared that the officers of the company had no knowledge of the alleged acts of drunkenness. "While the presumption is that if an employee is fit and competent when he enters the service of his employer, he remains so; this, however, does not relieve the company from the exercise of due care, and no matter how long an employee has been in the service of his employer, if as a result of his incompetence an injury results to a fellow employee, and it affirmatively appears that his incompetency was actually known to the employer; or that if the employer had exercised proper diligence he might have learned of it, the employer is liable."⁵¹

Fellow Servants—General Rule.

191. If several persons are employed as servants in the same general service, though in different departments of it, or though one holds an inferior position to the other, and one is injured by the carelessness of the other, the employer is not liable unless he has employed unfit persons for his service.⁵²

⁴⁹ *Hughes v. Baltimore & Ohio Railroad*, 164 Pa. 178 (1894.)

⁵⁰ *Huntsinger v. Trexler & Turrell Lumber Co.*, 181 Pa. 497 (1897.)

⁵¹ *Kelley v. Baltimore & Ohio R. R.*, 32 Pitts. 84 (1901.)

⁵² *Heiseman v. Pennsylvania R. R.*, 19 Lanc. 321 (1902.)

Where the facts are uncontradicted the question, whether a person employed by a railroad company is a vice-principal, or a fellow servant of other employees is a question for the court, but where the facts are not clear the question must be submitted with proper instructions to the jury.⁵³

Plaintiff was injured while in the employ of the defendant as a conductor on a single track railway and was in charge of car No. 4. Car No. 2, to which was attached a wrecking truck, and car No. 1, which followed it, were standing on a turnout while car No. 4 passed in the opposite direction on the main track. After car No. 4 had passed, and as car No. 2 was entering on the main track, the truck attached to the latter became derailed. The superintendent of the company called in a general way to employees within hearing to "give us a hand to put on the truck," and three employees of the company left car No. 1 and went to assist the men in replacing the truck. While they were thus engaged, car No. 1, by reason of the ratchet not being properly adjusted to the teeth of the wheel so as to secure the brakes, moved backward off the turnout and on to the main track, where there was a descending grade, and overtook and collided with car No. 4, injuring the plaintiff. It was held that as the failure to properly secure the brakes was due to the neglect of a fellow servant, plaintiff was not entitled to recover.⁵⁴

Who Are Fellow Servants.

192. A car inspector, who tests an electric car for the purpose of testing the efficiency of its electrical appliances and not for the purpose of determining the safety of the car either for the employees, or the public, is while so engaged a fellow servant of the conductor of the car.⁵⁵

A track layer employed as one of a gang on a construction train is a fellow servant of a flagman or engineer of a freight train.⁵⁶

An employee of a telegraph company whose lines are used

53 *Evilhock v. Phila., Harrisburg & Pittsburgh R. R. Co.*, 169 Pa. 592 (1895.)

54 *Hoover v. Carbon County Electric Ry. Co.*, 191 Pa. 146 (1899.)

55 *Shugard v. Union Traction Co.*, 201 Pa. 562 (1902.)

56 *Benignia v. Pennsylvania R. R.*, 197 Pa. 384 (1900.)

by a railroad company under contract, and who is placed in charge of a gang of men employed by a railroad company, and who directs them in the repairing of a line of telegraph is a fellow servant of the men under his charge.⁵⁷

A locomotive engineer and a fireman of a freight train are fellow servants; as are also an engineer and brakeman.⁵⁸

A railroad telegraph operator and a track walker are fellow servants.⁵⁹

An employee of a coal company engaged in unloading a car upon a trestle built upon the land of a railroad company, is a fellow servant of the trainmen.⁶⁰

A track repairer is a fellow servant of a foreman, engineer, conductor or switchman.⁶¹

An inspector of air brakes and a brakeman are fellow servants.⁶²

Who Are Not Fellow Servants.

193. A boiler inspector of a railroad company is not a fellow servant of a locomotive engineer.⁶³

A train dispatcher within the limits of his employment is a vice principal of the railroad company employing him.

The case is for the jury where the evidence shows that the train dispatcher directed an engineer to run carefully on a certain track and stated to him that there were fifteen cars at a street named, and the engineer ran carefully and collided with cars twelve or fifteen hundred feet nearer than the point named, causing injury to a brakeman.⁶⁴

A person employed to work on a railroad bridge who is furnished free transportation to and from his work as part of his

57 *Johnson v. Western New York & Pennsylvania Ry.*, 200 Pa. 314 (1901.)

58 *Welsh v. Pennsylvania R. R.*, 192 Pa. 69 (1899); 16 *Lanc.* 257 (1899); *Kennelty v. Baltimore and Ohio R. R.*, 166 Pa. 60 (1895.)

59 *Heiseman v. Pennsylvania R. R.*, 19 *Lanc.* 321 (1902.)

60 *Peplinski v. Pennsylvania R. R.*, 203 Pa. 52 (1902.)

61 *Palko v. Central R. R. of New Jersey*, 9 *Kulp* 550 (1900.)

62 *Fullmer v. New York Central & Hudson River Ry.*, 208 Pa. 598 (1904.)

63 *Marsh v. Lehigh Valley R. R.*, 206 Pa., 558 (1903.)

64 *Brommer v. Philadelphia & Reading Ry.*, 205 Pa. 432 (1903.)

compensation, is while traveling to his home in the position of a passenger, and not a fellow servant of an engineer of the company.⁶⁵

Cases Under the Act of April 4, 1868.

194. A postal clerk in the employ of the United States post office department, while traveling on a railroad in the performance of his duties is not a passenger within the meaning of the Act of April 4, 1868, but is in the position of a fellow servant of a brakeman in the employ of the railroad company.⁶⁶

A workman engaged in loading iron plates into a car for an iron company, when the car was shifted by a railroad company and who was killed by reason of the car running off the track, causing a large number of metal plates to fall upon him, is within the terms of the act.⁶⁷

Plaintiff, an employee of an iron company, was injured by being struck by a car of a railroad company while loading a car with iron for the iron company. There were two tracks, the one on which stood the car which was being loaded, and another between that track and the rolling mill; the space between the two sets of tracks was about seven feet, both tracks being on the land of the iron company; the cars which stood and ran on the tracks belonged to the railroad and were run in and drawn out at the orders or request of the iron company. In loading the car on the farther track, plaintiff and his co-employees of the iron company took up pieces of iron at the shears in the mill and carried them across the empty track to the car they were loading on the outside track; after placing his iron on the standing car, they crossed back to the mill for another load. Plaintiff, after placing his pieces of iron on the car, either while on the space between the sets of tracks or when barely on the empty track, was struck by a cinder car which the railroad company had shunted in on that track at the request of the iron company. It was held that plaintiff

65 *McNulty v. Pennsylvania R. R.*, 182 Pa. 479 (1897); 28 Pitts. 149 (1897.)

66 *Foreman v. Pennsylvania R. R.*, 195 Pa. 499 (1900); *Martin v. Philadelphia & Reading Ry.*, 200 Pa. 603 (1901); affirming 4 Dauph. 89 (1901.)

67 *Shvagzdys v. Pittsburgh & Lake Erie R. R.*, 31 Pitts. 136 (1900.)

was a fellow servant of the trainmen within the meaning of the Act of April 4, 1868, and could not recover damages from the railroad company for his injuries.⁶⁸

An employee of a coal dealer who was injured by the negligent act of another employee of a coal dealer in pushing on to a trestle in the yard of the coal dealer an obviously defective car, cannot recover damages either from the railroad company or his employer, inasmuch as the injuries were due to the negligence of a fellow servant.⁶⁹

In an action by the wife of an employee of the owners of a quarry against a railroad company, for the death of her husband, it appeared that on the day of the accident the defendants had backed a number of cars into the quarry where the deceased was working. They were not left at the place where they were wanted and an engine and crew were sent back to move the cars to the point where they were wanted. Before the engine arrived a blast was discharged in the quarry and a fragment of stone struck the shaft of a derrick with such force as to break it into two pieces, and thereby to slacken and let down the wire guy rope which supported the derrick, and which was about three-fourths of an inch in thickness. The weeds and grass in and along the track were high enough to make it difficult to see the rope until within a few feet of it. Soon after the accident had happened the engine and crew returned to place the cars in proper position. One of the owners of the quarry stood at the entrance of the yard and directed the movements of the train. He knew of the falling of the rope, and intended to notify the trainmen, but he did not. While the cars were being moved under his orders, the rear car struck the rope with its wheels, in consequence of which a part of the shaft with which it was connected fell, and struck and killed the deceased. The track was not under the railroad company's care, but belonged to the quarrymen, and was within their private grounds. The brakeman was at a proper point on the train to see any visible obstruction, and to warn the engineer. Neither the brakemen nor any of the trainmen knew of what had happened during their absence from the

68 *Weaver v. Philadelphia & Reading Ry. Co.*, 202 Pa. 620 (1902.)

69 *Rehm v. Pennsylvania Railroad Co.*, 164 Pa. 91 (1894.)

yard. It was held that there was no proof of negligence on the part of the railroad company, and that the plaintiff was not entitled to recover.⁷⁰

If a trestle is constructed by a coal company on the land of a railroad company, but used for the mutual benefit of the railroad and canal company, an employee of the coal company who is employed on the trestle in unloading a car is a fellow servant of the trainmen of the railroad company within the meaning of the act and cannot recover from the railroad company if he is injured by the company's employees.⁷¹

Cases Not Under the Act of April 4, 1868.

195. Plaintiff's husband, an engineer employed on the Central R. R. of New Jersey, was killed through the negligence of employees of the Philadelphia & Reading road while running his engine over the tracks of the latter company. It was held that plaintiff's widow was entitled to recover, and that the Act of 1868 did not apply.

Mitchell, J., said: "The rules to be deduced from the cases as substantially determined in *Kelly v. Union Trac. Co.*, 199 Pa. 322, are: First, when the same track is used by two railroad companies, it must be considered for the application of the Act of 1868 as the property of each while using it. Secondly, whether the use be by virtue of joint or several ownership, charter right, lease, license or traffic agreement, is immaterial. Thirdly, to bring the case within the second class distinguished in *Spisak v. B. & O. R. R. Co.*, 152 Pa. 281, namely, those where the employment is ordinarily the duty of railroad employees, the plaintiff must not only be engaged in such work, but also be so engaged for or upon the property of the railroad by whose negligence he is injured. Thus in the present case the plaintiff's husband was engaged in railroad work as a locomotive engineer, but not for the defendant, nor upon premises which were to be treated as defendant's at that time. He was, therefore, not within the act. Fourthly, in such cases the employees of each road accept the risks of

70 *Forrest v. Philadelphia, Wilmington & Baltimore R. R.*, 174 Pa. 181 (1896); 6 Del. 333 (1896); affirming s. c. 6 Del. 170 (1895.)

71 *Peplinski v. Pennsylvania R. R.*, 203 Pa. 52 (1902.)

their employment in regard to their own road, but not those incident to the operation of the other road, unless at the time engaged in some work for the other or for both roads jointly."⁷²

An employee of an iron company whose work it is to unload cars in his employer's yard after the cars have been placed therein by a railroad company, is not a fellow servant of the trainmen of the railroad company engaged in placing the cars in the yard within the meaning of the Act of April 4, 1868, P. L. 68. The yard contemplated by the Act, is the yard of the railroad company, and not the yard of a customer of the railroad company.⁷³

A railroad company is liable where its employees negligently injure an employee of another company engaged in the service of his company in a railroad yard which is used in common by both companies. The Act of 1868 does not apply.

Plaintiff was a car inspector in the employ of the Central Railroad of New Jersey and was engaged in repairing a car of his employer at South Bethlehem, at which place three other railroad companies had junctions and connecting tracks. Plaintiff while occupied underneath one of the cars of the Central Railroad of New Jersey, which was standing on one of the shifting tracks of the yard, was injured by reason of the negligent handling of a Lehigh Valley train which was backed upon the track, ran over a blue flag placed to protect the car, such flag being the signal recognized by and known to the defendant company and its employees, and drove the train against the Central Railroad car under which plaintiff was working, and caused the plaintiff's injuries.

It was held that the company was liable, and that the Act of April 4, 1868, P. L. 68, did not apply.⁷⁴

Two passenger railway companies ran their cars east and west on the same tracks on Arch street in the city of Philadelphia, and by arrangement between themselves used the south track going east and the north track going west, con-

72 *Keck v. Philadelphia & Reading R. R.*, 206 Pa. 501 (1903.)

73 *Noll v. Philadelphia & Reading Railroad*, 163 Pa. 504 (1894.)

74 *Kunsman v. Lehigh Valley R. R. Co.*, 10 Super. Ct. 1 (1899.)

necting them by two switches at the eastern terminus. The duty of the car first arriving at the terminus was to run east of the east switch, while the car following it stopped between the two switches; the motorman of the first car or eastern car was then to reverse his trolley, turn the east switch and cross over to the north track for his western trip. On the occasion of the accident he neglected to turn the switch and ran his car west on the east-bound track till it struck the car that had followed it east, and injured the plaintiff, who was the conductor in the employ of the other company. It was held that the case was not within the Act of 1868, and the plaintiff could recover. "It is settled," said the court, "that the road on or about which the accident occurs need not be owned by the defendant company to bring it within the terms of the Act of 1868, but the use, by agreement, of the road of another company by the defendant company makes it the latter's road in contemplation of the Act. . . . The track at the point of the accident was in the use of the Hestonville Company and therefore had by agreement of the parties become for the time being the road of that company. Its employees in the operation of its cars had a right to be there and they could enforce their right to protection against the negligence of every one save the co-employees of that company."⁷⁵

An employee of an iron company whose work was to unload cars in his employers' yard was instructed to quit work while the crew of a railroad company were shifting cars. He obeyed the order, and after the lapse of about an hour and a half, when the track upon which he had been working appeared to be filled with cars, and about fifteen minutes after the last car had been pushed in, and the engine had moved out, he attempted to get upon the car at which he had been at work, when another loaded car was sent in with great speed and struck the car on which he was working. In an action against the railroad company for the injuries sustained, it was held that the defendant's negligence and the plaintiff's contributory negligence were questions for the jury.⁷⁶

⁷⁵ *Kelly v. Union Trac. Co.*, 199 Pa. 322 (1901); affirming 9 Dist. 69 (1900.)

⁷⁶ *Noll v. Philadelphia & Reading Railroad*, 163 Pa. 504 (1894.)

Evidence.

196. Where it is claimed that an accident happened by reason of the trainmen disregarding the rules of the company contained in a book of rules dated five days prior to the date of the accident, such book should not be admitted in evidence where it appears that it was not actually delivered to the trainmen until twenty-one days after the accident, although the book contained a recital on its first page that the rules were framed to take effect from date.⁷⁷

Where a conductor was killed in an accident caused by a broken rail, declarations made an half hour after the accident by the division foreman are inadmissible.⁷⁸

⁷⁷ *Dougherty v. Phila. & Reading R. R.*, 171 Pa. 457 (1895); 26 Pitts. 208 (1895.)

⁷⁸ *Briggs v. East Broad Top R. R. & Coal Co.*, 206 Pa. 564 (1903.)

CHAPTER XXVIII.

NEGLIGENCE—INJURIES TO PASSENGERS.

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| 197. General Duty of Carrier. | 204. Getting on Train. |
| 198. Duty to Provide Safe Roadbed. | 205. Alighting from Train. |
| 199. Presumption of Negligence. | 206. Acts of Other Passengers. |
| 200. Rebuttal of Presumption of Negligence. | 207. Where Passenger is Carried Beyond Station. |
| 201. No Presumption of Negligence if Accident is Unconnected with Means of Transportation. | 208. Where Passenger Obeys Instructions of Conductor. |
| 202. Accidents at Stations. | 209. Ejection of Passenger. |
| 203. Crossing Tracks at Stations. | 210. Wrongful Arrest by Railroad Detective. |
| | 211. Evidence. |

General Duty of Carrier.

197. "The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious."¹

Duty to Provide Safe Roadbed.

198. In an action by a passenger against a railroad company to recover damages for personal injuries caused by an alleged defective rail overturning the car in which he was riding, the case should be submitted to the jury where the evidence for the plaintiff tends to show that the rail in question had been

¹ Per Brown, J., in *Palmer v. Warren St. Ry.*, 206 Pa. 574 (1903.)

cracked one-third through for a considerable time, that it had been in use for ten years, and that it looked old and worn.²

Presumption of Negligence.

199. Where an injury occurs to a passenger in consequence of something done or not done, connected with the appliances of transportation, there arises the presumption of negligence which the carrier is required to rebut; but if the accident has no connection with the appliances or machinery, if it is so disconnected with the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities, or the negligence of his servants, no such presumption arises, and the burden of proof to show negligence is upon the plaintiff who avers it.³

Where a passenger is injured by reason of a defect in the roadbed, there is, *prima facie*, a presumption of negligence, which carries the case to the jury, although the evidence to rebut the presumption may be very strong.⁴

Where a passenger in going from a station platform to the track platform is injured by falling on a slope ten or twelve inches high on which ice and snow have been permitted to accumulate, and it appeared that the passenger was not guilty of contributory negligence, the railroad company is liable for the injuries sustained.⁵

Rebuttal of Presumption of Negligence.

200. Where a collision is occasioned by a boy loosing the brake of a car standing on a switch by hammering it with a coupling pin, and closing the throw-off switch, and the car runs down upon the main line, and a passenger is injured in the resulting collision, the facts are sufficient to rebut the presumption in favor of the passenger, of negligence on the part

² *Dampman v. Pennsylvania R. R.*, 166 Pa. 520 (1895.)

³ *Fleming v. Pittsburgh, Cincinnati, etc. Ry. Co.*, 158 Pa. 130 (1893); *Dennis v. Pittsburg & Castle Shannon R. R.*, 165 Pa. 624 (1895); 25 *Pitts.* 354 (1895.)

⁴ *McCafferty v. Pennsylvania R. R.*, 193 Pa. 339 (1899.)

⁵ *Rathgebe v. Pennsylvania R. R.* 179 Pa. 31 (1897); 27 *Pitts.* 388 (1897.)

of the railroad company. In such a case the fact that there was no lock on the switch does not change the result.⁶

Where a rock starts from the point near the top of a natural hill rising precipitately above a railroad cut, and in its course makes several bounds, ultimately striking a train and killing a passenger, no presumption of negligence arises against the railroad company, since the accident was not connected with either the means or appliances of transportation or the construction of the road.⁷

A passenger was injured by the derailment of a train alleged to have been caused by the locomotive striking a cow. There was evidence that there were farms within a quarter or half a mile of the place of the accident, and that on two or three previous occasions, trains on the line had been stopped because cows were on the track. It was held that the court could not say as a matter of law that the presumption of negligence against the company had been rebutted by proof of the fact that the derailment was caused by a stray cow on the track.⁸

No Presumption of Negligence if Accident is Unconnected with Means of Transportation.

201. The rule that a presumption of negligence on the part of the carrier arises when a passenger is injured in the course of transportation cannot be invoked without evidence tending to connect the carrier, or its employees, or some of the appliances of transportation with the happening of the injury. To throw the burden upon the carrier it must be first shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation.

Plaintiff was injured while traveling as a passenger on one of defendant's trains. While she was sitting in a car next to a window an explosion occurred which was immediately followed by a foreign substance crashing through the window

6 *Fredericks v. Northern Cent. R. R.*, 157 Pa. 103 (1893.)

7 *Fleming v. Pittsburgh, Cincinnati, etc. Ry.*, 158 Pa. 130 (1893.)

8 *Clark v. Lehigh Valley R. R.*, 24 Super. Ct. 609 (1904.)

next to that at which plaintiff sat, and then taking a rotary track struck plaintiff on the head and crashed out through the window at which she sat. There was nothing found inside or outside the car to show what the missile was, nor any evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or any of the appliances of transportation, or that her injury was caused by the explosion of a torpedo signal conjectured by the plaintiff as the cause of the accident. It was held to be error to submit the case to the jury, as under all the evidence in the case the verdict should be in favor of the defendant.⁹

Accidents at Stations.

202. Where a passenger standing on the platform of a railroad station is struck and injured by the body of a dead woman who had been killed while negligently on the track and whose body had been hurled across the platform by a locomotive, the passenger is not entitled to recover, because, first, the railroad company's negligence, if there was any, was not the proximate cause of the injury, and because, second, the injury was due to the negligence of the deceased woman. "In order to warrant a finding that negligence or an act not amounting to wanton wrong is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."¹⁰

Where a passenger is injured in a station by another passenger rudely pushing a swinging door in his face, the railroad company cannot be charged with negligence because the door was not of glass above the middle rail, nor because there was a small screw-eye on the inner surface of the door where it could come in contact with a person's head.¹¹

Plaintiff took a train at the Philadelphia & Reading Ter-

⁹ *Ault v. Cowan*, 20 Super. Ct. 616 (1902); *Bernhardt v. West Penna. R. R.*, 159 Pa. 360 (1893.)

¹⁰ *Wood v. Pennsylvania R. R.*, 177 Pa. 306 (1896); affirming 4 Dist. 119 (1895); 16 Pa. C. C. R. 290 (1895.)

¹¹ *Graeff v. Philadelphia & Reading R. R.*, 161 Pa. 230 (1894); 25 Pitts. 37 (1894.)

minal Station to go to Girard avenue. As the train stopped at the station some of the passengers called out that their tickets had not been taken, whereupon a brakeman, who was on the car and not on duty, arose from his seat and either at that time or as he crossed the platform of the car called out: "I will take your tickets." He walked hurriedly out of the car across the platform to the front platform of the next car and down its steps to the floor of the station and received the passengers' tickets. Plaintiff alleged that the brakeman in passing her pushed her off the platform and steps causing her to fall to the ground and sustain severe injuries. There was positive evidence by a number of employees that it was the duty of a conductor or brakeman, not one of the crew of the train on which he was riding, who saw passengers leaving a car without having given up their tickets to notify some one of the crew, and to collect the tickets himself if directed to do so by the conductor, or if he could not notify one of the crew. It was held that it was for the jury to determine whether at the time of the accident the brakeman was acting in the line of his duty.¹²

Crossing Tracks at Stations.

203. The rule that it is the duty of a person about to cross a railroad track to stop, look and listen for an approaching train is not always applicable to a passenger at a station going to and from his train; the obligation upon him may be totally different from that of a person at a public crossing. A person in crossing a railroad track in order to reach his train, which was standing at the station ready for him to alight, relied upon the following rule which was in force at the time of the accident: "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station and must not proceed until the passenger train moves away or a signal has been given to come on, except where proper safeguards are provided between the tracks." It was admitted that there were no safeguards. Plaintiff did not stop, look and listen before going upon the track and was struck and killed by a train approach-

¹² *Schimpf v. Harris*, 185 Pa. 46 (1898.)

ing on the main track from the north. The court held that plaintiff could not be charged with contributory negligence as a matter of law, if in other respects, he was careful.¹³

The deceased and her mother had been to Wilkesbarre and had returned on the way to their home to Ransom Station of the defendant company. The testimony tended to prove that the mother and child alighted from a train on the far track from Ransom station; that between the place where the mother and child alighted and the station platform the roadway had been filled with cinders and ashes and that this was the way provided by the company for passengers to cross the tracks to the depot; that plaintiff saw other passengers directed by the conductor crossing in this way; that plaintiff looked up and down the west-bound track and seeing only the receding train, started to cross that track, and also when between the tracks stopped and looked up and down the east-bound track, but did not see any train; that she then started forward with the child close by her side and when stepping to the platform at the depot the child, who was immediately behind her, within the rails of the track nearer the depot, was struck by a fast express train which suddenly came around a curve, a few hundred feet away, and which was running very rapidly and without any signal, and killed.

It was held that the case was for the jury; and a verdict and judgment for the plaintiff was sustained upon appeal.¹⁴

Where a passenger intending to take a train proceeds under the mistaken belief that his own train is about to start and goes across an intervening track at the station without stopping to look or listen, and is struck and injured by the rear end of a train that was being backed up on the intervening track, he is not entitled to recover damages from the railroad company.¹⁵

Getting on Train.

204. Where provision is made for passengers to get on or off

13 *Betts v. Lehigh Valley R. R.*, 191 Pa. 575 (1899.)

14 *Girton v. Lehigh Valley R. R.*, 17 Super. Ct. 143 (1901); affirmed s. c. 199 Pa. 147 (1901.)

15 *Foreman v. Pennsylvania R. R.*, 159 Pa. 541 (1894.)

both ends of a smoking car, it is not negligence for a woman with children to enter on the front platform of the car.¹⁶

The rule that a passenger in attempting to get on a moving train takes the risk of the injuries that he may sustain by reason of the attempt, does not apply where a passenger has jumped upon a moving train, and after securing his standing on the step of the car with a firm hold of each side-rail, is pushed from the step by the brakeman and killed.¹⁷

For a wilful or intentional trespass by an employee outside of the line of his duty under his employment, the employer is not responsible, even though it be committed while the servant is in the exercise of his employment. But in the latter case its wilful and separate character must appear. Where the plaintiff, an intending passenger, declared for an unprovoked assault, by the conductor as he was about to enter the train, and the defence was a total denial of the assault, a verdict for the plaintiff will be sustained, notwithstanding the declaration is for an unprovoked assault, where there is evidence that what the conductor did was not in the course of his employment, but in the supposed performance of his duty in the orderly management of the passengers leaving and entering the train.¹⁸

In a suit by a passenger against a railroad company, the case is for the jury where the evidence for the plaintiff tended to show that he approached the train where a large number of persons were waiting to get on, that the conductor called out, "There is lots of room inside here; this train is going out right away;" that the plaintiff got on the platform to get in the car, but at the door found that it was so crowded that he could not push in; that others so crowded up behind him that he could not get down from the platform; that the car started, and the conductor, who was on the platform, immediately began taking up the tickets; that one passenger, by his ticket, was on the wrong car, and the conductor commanded him to get off and commenced pushing aside the passengers on the platform

16 *Peterson v. Delaware, Lackawanna & Western R. R.*, 9 Kulp 552 (1899.)

17 *Sharrer v. Paxson*, 171 Pa. 26 (1895.)

18 *McFarlan v. Pennsylvania R. R.*, 199 Pa. 408 (1901.)

to enable this man to get down the steps, when plaintiff was pushed off backwards through the opening in the platform railing and injured.¹⁹

Alighting from Train.

205. A person who is injured in getting off a moving train, when neither requested nor directed to do so, nor led to do so by any negligent act of the trainmen, cannot recover from the railroad company.

Plaintiff, a young woman, was a passenger on a train, going to a station called "Stewart." As the train approached the station its speed was lessened, and the conductor and brakeman each announced: "The next station is Stewart." The plaintiff immediately started from the seat she had occupied in the back part of the car, for the door in the front. When she reached the front platform the brakeman stationed there asked her to pass on to the next car, stating as the reason for his request that she could not alight from the car in which she was without getting into the water or mud at the side of the tracks. When she had reached the middle of the second car the train stopped, but started again before she had come to the front platform. The conductor and a brakeman were on this platform, on the side of the car from the station, looking forward to ascertain the cause of the stoppage of the train. They neither saw nor heard her when she said that she wanted to get off, and she made no further attempt to attract their attention. She testified that she then noted the speed of the train, and thought that she could alight safely. With a bundle in her hand she stepped down from the moving train to the platform. While doing this, she observed that the train was moving faster than she had supposed, and to avoid falling she took hold of the rail of the car with her back to the engine, and was thrown between the platform and the track. The momentary stoppage of the train when she was at the middle of the car was to allow a train moving in the opposite direction, which had reached the station, to discharge and receive passengers. It was held that plaintiff could not recover.²⁰

19 *Dennis v. Pittsburg & Castle Shannon R. R.*, 165 Pa. 624 (1895); 25 Pitts. 354 (1895.)

20 *Victor v. Pennsylvania R. R.*, 164 Pa. 195 (1894.)

No presumption of negligence arises against the railroad company where a passenger in alighting from a train is injured by stepping upon a small piece of wood, two-thirds of an inch in diameter and two inches in length. Such an accident is not connected with the appliances or means of transportation, and as the piece of wood itself, is not an obstruction likely to cause injury, failure to remove it promptly cannot be pronounced a neglect of duty by the railroad company.²¹

A passenger is not justified in jumping from a train moving at the rate of from ten to fifteen miles per hour, although the company has been negligent in leading him to get upon the wrong train, and a trainman tells him that he is on the wrong train, that it will not stop, and that it is going slow, and he can jump from it.²²

A rule of a railroad company, well known to the traveling public, required passengers in a combination car to leave the car from the end allotted to passengers and, not through the baggage portion of the car. A woman passenger when a train stopped at its destination, instead of leaving the car at the door assigned to passengers, went into the portion of the car which was used for baggage, and approached the side-door of the car through which the baggage was unloaded. The conductor, who was on the ground outside, extended his hand to help her alight, at the same time saying, "Step lively, madam, step lively." The woman thereupon jumped to the ground and was injured. It was held that a non-suit was properly entered.²³

A passenger who was injured while alighting at a station will not be permitted to recover on the ground that the space between the steps and the platform was too wide, where the only witness who testified on this subject stated that he thought the width was about sixteen or eighteen inches, but that he "could not tell for sure," and it appeared that the exact distance could have been shown by actual measurement.²⁴

If by the coupling of a shifting engine, a car is so moved

21 *Bernhardt v. West Penna. R. R.*, 159 Pa. 360 (1893.)

22 *Rothstein v. Pennsylvania R. R.*, 171 Pa. 620 (1895.)

23 *Deery v. Camden & Atlantic R. R.*, 163 Pa. 403 (1894.)

24 *Rothchild v. Central R. R. of New Jersey*, 163 Pa. 49 (1894.)

as to cause a passenger who is alighting from a train to fall against the brake and to receive an injury, the duty which the railroad company owes to its passengers is violated.

Plaintiff, a passenger, was injured while attempting to alight from a train. When the train reached the terminal station it stopped and the passengers began to leave the car. Plaintiff testified that she rose from her seat, with the other passengers, walked to the front of the car, came out upon the platform and faced to the right to go down the steps and was in the act of reaching out to take hold of the hand-rail with her left hand, when by a heavy jar of the car, she was thrown violently forward against the brake wheel and the hand-rail of the car and then back against the end of the car, causing her serious injury. A verdict and judgment for plaintiff was sustained.²⁵

After a train has reached its terminus and is at a standstill, it is the duty of a railroad company to give the passengers sufficient time to alight in safety before removing the train from the station. If the car is jolted, jarred or moved, as a result of an attempt at coupling, the effect is precisely the same as in the more usual case of the starting of a train while the passengers are getting on. Under such circumstances passengers are entitled to a reasonable time to leave the cars in safety. Where the coupling of the car is a necessary incident to the journey, the company owes to the passenger only the duty of performing the operation of coupling with due care, and without negligence.²⁶

Plaintiff was injured while alighting from a train at Columbia avenue station, in the city of Philadelphia, at 10 p. m.

Instead of stepping from the third or lower step of the car platform on to the ground, she stepped from the second step over on to the platform, a distance of about two feet, and fell between the car and the station platform, which was raised from eighteen to twenty inches above the tracks. The conductor was present, ready to give any assistance to the plaintiff if she was in any uncertainty as to how to alight. The court held that there was no error in entering a non-suit.²⁷

²⁵ *Raughley v. West Jersey and Seashore R. R.*, 202 Pa. 43 (1902.)

²⁶ *Raughley v. West Jersey and Seashore R. R.*, 202 Pa. 43 (1902.)

²⁷ *Kurfess v. Harris*, 195 Pa. 385 (1900.)

In an action against a railroad company to recover damages for personal injuries sustained while a passenger on defendant's train, the evidence for the plaintiff tended to show that as the train was slowing down on approaching a station, plaintiff went upon the platform and started down the steps, holding on to the handrail, and when he reached the third step it either broke under his weight or was not in position, so that he fell under the wheels and was injured. Defendant's evidence tended to show that the step was in good condition, and that the plaintiff fell as the result of hurriedly endeavoring to alight from the train before it stopped. It was held that the case was for the jury.²⁸

It is the duty of a railroad company to provide a safe and convenient means of passage to and from its passenger cars, and it is the duty of a passenger to comply with the company's reasonable rules and regulations for entering and leaving the cars, by using the way provided.

Plaintiff was injured at a station where there were five tracks. An elevated platform extended along the side of the track nearest the station and from this platform steps led to two overhead crossings, one north and one south of the station. Plaintiff on a thick and rainy morning, upon the arrival of his train at the station, instead of alighting on the station platform left the train on the opposite side. He came to the station on a train which ran on the second track, and started to cross the third, fourth and fifth tracks in order to reach by a shorter route the works at which he was employed. As he stepped upon the third track he was struck by a car which was running at the rate of six or eight miles an hour, and which could have been seen by him when he was at least sixty feet distant. The judgment of non-suit was sustained, the Supreme Court saying: "He had a safe way to alight from the train on the station side of the track; here he could have waited until the car had passed, or by use of one of the overhead crossings could have avoided altogether the danger of crossing the tracks. He was not invited to get off where he did and he was under no imperious necessity to do so. The invitation

²⁸ Coburn v. Philadelphia, Wilmington & Baltimore R. R., 198 Pa. 436 (1901.)

was to alight on the other side and in discarding it he violated a reasonable rule, which it was his duty to observe."²⁹

If the way provided by a railroad company for a passenger after alighting from a train is across a track, he may rely upon the performance by the company of the duty to keep the track clear while passengers are in the act of passing between the train and the station. But this is only when a way is provided and the passenger is impliedly invited to take it. If a passenger disregards the rules of the company by passing to and from the cars on the opposite side from the station or platform provided, he does so at his peril.³⁰

Knowledge by a passenger that a safe and convenient platform has been provided by the railroad company is notice to him, of a rule that passengers should get off and on the cars at that place.³¹

If a railroad company stops its trains at its stations a sufficient length of time to enable passengers to alight, if they use reasonable diligence, it has performed its duty. Railroad companies are not required to lock the doors or station an employee on the platform of each car to prevent passengers from leaving the train after it has stopped a reasonable length of time.

A charge to the jury that "If your belief is that she (plaintiff) was hurt by reason of the train starting while she was coming down the steps of the car, and she was by reason of that, thrown off, then your verdict ought to be for the plaintiff," was held to be error.³²

Shortly before a train arrived at a terminal station, a passenger, an elderly man, was obliged to go to a closet in the car to relieve his bladder. He came out of the closet as soon as he could. This was two or three minutes after the train had stopped. He immediately proceeded to alight, and as his foot

²⁹ *Flanagan v. Philadelphia, Wilmington & Baltimore R. R.*, 181 Pa. 237 (1897.)

³⁰ *Flanagan v. Philadelphia, Wilmington & Baltimore R. R.*, 181 Pa. 237 (1897.)

³¹ *Flanagan v. Philadelphia, Wilmington & Baltimore R. R.*, 181 Pa. 237 (1897.)

³² *Standen v. Pennsylvania R. R.*, 28 Pa. C. C. R. 415 (1903); 12 Dist. 223 (1903.)

was on the second step, the train started suddenly without warning, and the man was thrown and injured. It was held that the case was for the jury.³³

A claim by a passenger injured while alighting at a station that the platform was inadequately lighted, is not sustained where one of the witnesses states that there was an electric light one hundred feet from the place where the accident occurred, and another witness testified that the electric light was only fifty feet away.³⁴

Where a person, after alighting at a railroad station and having a choice of two ways in going to his house, the one illuminated and bright, the other dark and beset with danger, chooses the latter, falls into a sewer opening and is injured, he is guilty of contributory negligence and cannot recover, even although the latter route is over defendant's property and by use has become a public thoroughfare.³⁵

Plaintiff, a passenger, was injured on a dark night by stepping from a train on to a bridge and falling into a river. The testimony of the plaintiff, although contradicted, tended to show that before the accident occurred he was given to believe from some words which he had with the conductor, that the next stop would be at the station, and that the conductor was on the platform, saw him descend and gave him no warning of his perilous position. It was held that the case was for the jury. The court said:

"It is the duty of a carrier of passengers not only to exercise the strictest vigilance in receiving and conveying a passenger to his destination, but also to set him down safely at a station at the termination of his journey. It is likewise the duty of the carrier to announce the name of the station on the approach of the train and to afford passengers sufficient time to alight with safety. If after this announcement the train for any cause makes its next stop short of, or beyond, the station, the conductor or brakeman should announce the fact before the

33 *Farr v. Phila. & Reading Ry.*, 24 Super. Ct. 332 (1904.)

34 *Rothchild v. Central R. R. of New Jersey*, 163 Pa. 49 (1894.)

35 *Smith v. Lehigh Valley R. R.*, 21 Pa. C. C. R. 9 (1898.)

passengers attempt to leave the train, and a neglect to do so will be a violation of duty for which the carrier is responsible."³⁶

Acts of Other Passengers.

206. A railroad company as a common carrier, is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. Thus, a railroad company is not liable for injury to a passenger caused by another passenger rudely and suddenly pushing a swinging door into the first passenger's face.³⁷

Plaintiff was injured while trying to get on an excursion train at the defendant's station. The evidence tended to show that prior to the accident a large crowd of excursionists had gathered at the station; that several hundred of them rushed across the tracks to the uncrowded side; that plaintiff was pushed along with the crowd; that when the excursion train pulled in there proved to be an insufficiency of cars, some of which were kept locked, and that when the plaintiff was on the third track and while attempting to get on the excursion train a freight train on the third track was run into the crowd and plaintiff injured. Plaintiff testified that he "at first stood on the platform under the shed and the immense crowd came and crowded him forward and I was crowded over as far as the second track. At that time there was some one coming along, I don't know who, that parted the crowd to make room for the excursion train, and I was shoved over on the third track." The court held that the conduct of the lower court in leaving the question of defendant's negligence and plaintiff's contributory negligence to the jury was proper.³⁸

Where Passenger is Carried Beyond Station.

207. Plaintiff, a passenger on one of defendant's cars, fell asleep and was carried past his station. At the next stop, at

36 *Englehaupt v. Erie R. R.*, 209 Pa. 182 (1904.)

37 *Graeff v. Philadelphia & Reading R. R.*, 161 Pa. 230 (1894.)

38 *Begley v. Pennsylvania R. R.*, 201 Pa. 84 (1902.)

the suggestion of the conductor, but without any compulsion or payment of any additional fare, he alighted from the rear end of the train in a neighborhood, which he admitted to the conductor and brakeman that he was familiar with, and started to walk back to his station, between the tracks, and after going some distance fell into an opening of a culvert which traversed the roadway and was injured. The court held that a non-suit was properly entered.³⁹

Plaintiff's husband, although intoxicated, but not in a helpless condition of intoxication, was carried a short distance past his station just after dark in the evening. The conductor, knowing where he wanted to alight, stopped the train, assisted him to alight and pointed out to him the station, which had been passed. The place where he got off the car was exceedingly dangerous. He reached the station in safety, passed by it and on to the tracks of another company and proceeded along them eleven hundred feet, where his body was found about four or five o'clock the next morning. It was held that the company was not liable for his death.⁴⁰

Plaintiff applied at a ticket office on a railroad connecting with the defendant's for a ticket on defendant's road, and was told that she could be furnished with a ticket only to a station twelve miles beyond her destination. She accepted the ticket and when she arrived at defendant's road, she took a local train which did not go as far as her destination, and the conductor punched her ticket. From this point she took another train that stopped at her desired destination; she informed the conductor when he came for her ticket, where she wanted to get off, and he replied that he would let her off. The conductor accepted her ticket and made no objection to the fact that it had already been punched on his division. When the train approached the station of her destination, plaintiff watched for the station, but no signal being given, she was not aware that the train had stopped at the station until it was moving away. She immediately sought the conductor and told him that no announcement of her station had been made on her

39 *Fisher v. Paxson*, 182 Pa. 457 (1897.)

40 *Hamilton v. Pittsburgh & Lake Erie R. R.*, 183 Pa. 638 (1898); 28 Pitts. 394 (1898.)

car. He assisted her off the car in the dark and pointing to a light some distance off told her that that was the station. She told the conductor that she did not feel able to go any further, but notwithstanding this he went into the car, and she then started to walk toward the depot. In walking back to the station, she fell twice and was injured. It was held to be error to give binding instructions for defendant as the questions of the negligence of the defendant and the contributory negligence of plaintiff were for the jury.⁴¹

Where Passenger Obeys Instructions of Conductor.

208. Where a conductor of a street car accompanied a passenger injured on his car to a physician and requested him to attend him, the physician has no right of action against the street car company for the services rendered. *Aliter*, in the sudden emergency of a serious accident, where the passenger is so crippled or disabled that he cannot help himself or go anywhere.⁴²

Ejection of Passenger.

209. Where a passenger is improperly ejected from a train by the employees of the railroad company, he may recover in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings.⁴³

Wrongful Arrest by Railroad Detective.

210. If a person has the general authority, actual or apparent, to act for a railroad company in the capacity of detective officer, and such authority includes, expressly or by general usage and consent, the power to make an arrest in the company's behalf, the mode of execution of such power with warrant or without is immaterial, and the company is liable in the case of a false arrest of a passenger in either event. This

41 *Case v. Delaware, Lackawanna & Western R. R.*, 191 Pa. 450 (1899.)

42 *Patterson v. Consolidated Trac. Co.*, 9 Dist. 362 (1900); 31 Pitts. 4 (1900.)

43 *Duggan v. Baltimore & Ohio R. R.*, 159 Pa. 248 (1893.)

is in accordance with the rule that if a master orders a thing done he is responsible for the manner in which it is done.⁴⁴

A railroad company cannot be indicted criminally for an assault and battery or manslaughter committed by one of its employees.⁴⁵

Evidence.

211. In an action by a passenger against a railroad company to recover damages for personal injuries alleged to have been caused by a defective rail, declarations of the track foreman, who was a witness, may be admitted for the purpose of enabling the jury to judge of the credibility of the witness and not for the substantive purpose of showing that the track was in bad condition at the time the accident occurred.⁴⁶

Where a passenger was injured by falling into a culvert while walking upon the tracks after alighting from a train, evidence that the culvert was repaired after the accident is inadmissible, where there is nothing to show that the railroad company failed in any duty to the passenger while he was alighting from the train.⁴⁷

44 *Duggan v. Baltimore & Ohio R. R.*, 159 Pa. 248 (1893.)

45 *Commonwealth v. Punxsutawney Street Pass. Ry. Co.*, 24 Pa. C. C. R. 25 (1900); 31 Pitts. 42 (1900.)

46 *Dampman v. Pennsylvania R. R.*, 166 Pa. 520 (1895.)

47 *Fisher v. Paxson*, 182 Pa. 457 (1897.)

CHAPTER XXIX.

NEGLIGENCE—IMPROPER CONSTRUCTION OF ROAD BED.

212. Improper Construction of Culvert.

213. Improper Construction of Bridge.

Improper Construction of Culvert.

212. If a railroad company constructs a culvert so unskillfully and negligently as to be insufficient to vent the ordinary high water of a stream, it is liable for the injury thereby caused.¹

A railroad company in constructing a culvert is only bound to provide for ordinary high water, and not for extraordinary freshets. The question whether it has so constructed the culvert as to carry away water in an ordinary flood is for the jury.²

The jury in considering what is an extraordinary flood in a particular stream, must consider what should be expected in that particular stream, taking into account its character, the adjacent territory and previous floods.

Land was injured by a flood caused by the breaking of a culvert. Defendant denied its liability for the injury, alleging that the flood was an extraordinary one, and therefore one which they were not bound to anticipate in the construction of the embankment and bridge. The evidence for plaintiffs, although conflicting, tended to show that in a period of forty-two years, including the one in question, there had occurred four floods in this creek of about equal force and volume of water. It was held that the finding of the jury that the flood was an ordinary one and that defendant was liable for its failure to maintain its culvert so as to resist ordinary floods would be sustained.³

Improper Construction of Bridge.

213. Where land is damaged by reason of an ice gorge at a

1 *Brown v. Pine Creek Railway Co.*, 183 Pa. 38 (1897.)

2 *Fick v. Pennsylvania R. R.*, 157 Pa. 622 (1893.)

3 *Brown v. Pine Creek Railway Co.*, 183 Pa. 38 (1897.)

bridge of a railroad company, the fact that the ice gorged at the bridge and backed the water on plaintiff's property is not sufficient to charge the railroad company with negligence; plaintiff must go further and show that the railroad company did not construct the bridge with proper care and skill, having regard to the land owner above and below. Plaintiff's evidence showed that the width of the waterway under the bridge was more than double the width of the stream; that this width was ample for all ordinary freshets and floods; that this was an ordinary freshet, but the ice was of more than ordinary thickness; that it began piling up above the bridge; that the gorge reached a height of fifteen feet; that in its movement down the stream, it gathered bulk so that when it reached the bridge its mass was so huge that it rested against the bridge for three hours, and that in this time the water of the stream was backed and injured plaintiff's property. The court in approving a non-suit entered by the lower court said: "The railroad company had provided for every ordinary contingency of flood and ice; it had not provided for this extraordinary one, the accumulation of a large body of ice, thousands of feet above and floating down in one great mass upon the bridge; nor did ordinary care require it to provide for such a contingency. While it was required to provide for ordinary freshets and the ordinary floating ice, it could not in the exercise of ordinary foresight have provided for this. If an ordinary flood had detached and floated down a house or other building, it would not have been negligence not to provide a span high enough and wide enough for a house to pass through; nor if, as sometimes occurs, a large mass of drift, consisting of trees and stumps, should have floated down and choked the flow of the stream at the spans, could they have been expected in the exercise of ordinary care to provide for such a circumstance. They were not bound to extraordinary prevision; the most competent engineer was not bound to see what was unseeable; he was only bound to foresee and provide for the volume and destructiveness of the ordinary flood and the ordinary force and bulk of floating ice."⁴

⁴ *Berninger v. Sunbury, Hazleton & Wilkes-Barre Ry. Co.*, 203 Pa. 516 (1902.)

CHAPTER XXX.

NEGLIGENCE—DAMAGE BY FIRE FROM SPARKS.

214. Damages by Fire from Sparks.

215. Damages from Escaping Oil or Exploding Powder.

Damage by Fire from Sparks.

214. In an action against a railroad company to recover damages for the burning of plaintiff's barn, with its contents, caused by sparks from the railroad company's engines, the burden of proof is upon the plaintiff to prove negligence on the part of the defendant and if the evidence is contradictory and conflicting the case is for the jury.

Plaintiff's wife testified that she was standing on the porch of her house near the barn and saw the particular engine which was throwing out great volumes of smoke pass; that in the smoke which passed over the house were great large particles of burnt cinders as large as a finger end; that the smoke had just cleared away when she saw the fire in the barnyard. The defendant offered evidence to show not only the want of probability of the facts testified to by plaintiff, but of the impossibility of sparks of the size stated being thrown out by the engine, which was provided with the latest approved and best designed spark arrester in use. It was held that the case was for the jury.¹

The negligent accumulation of combustible rubbish on the right of way to which fire may be communicated by sparks and from which fire may be communicated to neighboring woodlands may be the basis of recovery for the destruction of such woodlands.

Plaintiff's woodland was burned and the plaintiff alleging negligence in the construction and management of the de-

¹ *Matthews v. Pittsburg & Lake Erie R. R. Co.*, 18 Super. Ct. 10 (1901); affirming 24 Pa. C. C. R. 370 (1900.)

fendant's engines, and also that the defendant negligently permitted combustible material to accumulate on its right of way, brought an action to recover damages for the burning of his woodland; the evidence showed that near the plaintiff's woodlands and on the defendant's property weeds, briars and bushes had been cut and allowed to remain, and this accumulation had been added to by leaves blown by the wind, and caught in the brush. A witness for the plaintiff testified that the fire started in the accumulation of rubbish; that it began after a train had passed, and that at the point where the fire started there was a heavy grade and that the engines going up the grade emitted sparks and cinders. Defendant's witnesses testified that the fire originated on the plaintiff's land and spread towards the railroad. There was no evidence of the defective construction of defendant's engines. It was held that the case was for the jury and a verdict and judgment for plaintiff was sustained upon appeal.²

The mere fact that the fire originated on the right of way, or that weeds and grass cut in the autumn had been allowed to remain on the right of way during the winter, is insufficient to convict the company of negligence. If it appears that the engine that passed over the road a short time before the fire was provided with an approved spark arrester which was in good order at the time, and no positive proof of negligence is shown, the company cannot be held liable.³

It may be shown that the locomotive, which was alleged to have caused the fire, had on various occasions thrown out sparks of unusual size.⁴

Where plaintiff's property was set on fire by sparks from a locomotive, the case is for the jury where the evidence submitted by the plaintiff tended to show that the sparks which caused the fire were emitted from a particular engine; that the same engine, on the same day, and within a distance of three miles, set eleven other fires on farms adjoining or crossed by the railroad and that some of these fires were set by sparks thrown from three to four rods beyond the right of way; and

2 *Stephenson v. Pennsylvania R. R.*, 20 Super. Ct. 157 (1902.)

3 *Taylor v. Pennsylvania Schuylkill Valley R. R.*, 174 Pa. 171 (1896.)

4 *Van Steuben v. Central R. R. of New Jersey*, 178 Pa. 367 (1896.)

that an engine provided with an improved spark arrester and properly run, will not set fires upon lands outside of the right of way as this particular engine did.⁵

If the evidence for the plaintiff tends to show that the sparks which caused the fire were emitted from a particular engine, the case is for the jury, notwithstanding the testimony that the engine was provided with a sufficient spark arrester. In such a case the absence of a spark arrester is *prima facie* evidence of negligence on the part of the company.⁶

If a railroad company gives evidence that a particular locomotive was provided with an approved spark arrester on a particular day, and the plaintiff shows that numerous fires had been caused by sparks emitted from this engine on that day, the case should be submitted to the jury.⁷

Damage from Escaping Oil or Exploding Powder.

215. In *Commercial Ice Company v. Philadelphia & Reading R. R. Co.*, it appeared that a tank car containing six thousand gallons of oil became derailed through no fault of defendant, and oil from the car ran through a break in the tank at the rate of two gallons a minute and flowed into a stream which carried the oil into the plaintiff's ice pond. An effort was made by the defendant to pump the oil through a trough into an oil car without success, and at the end of ten or eleven hours from the time of the accident the valve of the bottom of the tank was opened and the remaining oil let out. Plaintiff, although not alleging that the defendant was responsible for the damage done by the flow of oil through the hole in the tank, contended that defendant was negligent in opening the valve of the tank and allowing the oil to flow through it. The court held that it was not error to direct a verdict for defendant, as it could not be doubted that the oil which passed through the hole in the

⁵ *Thomas v. New York, Chicago & St. Louis R. R. Co.*, 182 Pa. 538 (1897); 28 Pitts. 194 (1897.)

⁶ *Matthews v. Pittsburg & Lake Erie R. R.*, 18 Super. Ct. 10 (1901); affirming 24 Pa. C. C. R. 370 (1900.)

⁷ *Thomas v. New York, Chicago & St. Louis R. R. Co.*, 182 Pa. 538 (1897); 28 Pitts. 194 (1897.)

tank before the valve was opened was more than sufficient to destroy all the ice which remained in the pond.⁸

In an action to recover damages for personal injuries sustained by an explosion of naphtha which had escaped from a car on a railroad, it appeared that prior to the accident a collision occurred between two cars containing naphtha, resulting in holes being pierced in one of them. The naphtha ran out on the ground and into a catch basin near by. Shortly afterwards the car was moved along the track with the naphtha running out as the car moved. In passing a switch light the naphtha ignited, and the flame of the fire following the course of the running naphtha reached the catch basin, and from there it passed into a culvert which ran under a bridge on which plaintiff was standing. A violent explosion took place near the bridge and plaintiff was injured. The case was submitted to the jury, and it was held that a verdict and judgment for plaintiff should be sustained.⁹

Where blasting powder explodes on a moving train and injures a person in a house situated four hundred feet from the car which exploded, and sixty-eight feet below the level of the track, the question whether the explosion was an unavoidable accident, or whether it was due to the railroad company's negligence is a question for the jury.¹⁰

⁸ 197 Pa. 238 (1900.)

⁹ *Gudfelder v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 207 Pa. 629 (1904.)

¹⁰ *Dougherty v. Phila. & Reading R. R.*, 171 Pa. 457 (1895); 26 *Pitts.* 208 (1895.)

CHAPTER XXXI.

NEGLIGENCE—STREET RAILWAYS—RELATIVE RIGHTS OF COMPANY AND PUBLIC IN STREETS.

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| 216. Relative Rights of Company and Public in Streets. | 218. Wanton Conduct of Employee. |
| 217. Duties as to Care of Roadbed. | 219. Killing of Animals. |

Relative Rights of Company and Public in Streets.

216. Street railway companies have not the exclusive right to the use of a street in which it operates its road; nor has it such right to its own tracks. The streets of the municipalities of the State are for the use of the traveling public, and the right of the street railway company to use them is in common with the public. The street railway company and the public are alike liable for the negligent use of the street; each must exercise its rights thereon with care and a due regard for the rights of the other. While for reasons which are apparent a street car company must have a superior right to use its tracks in the operation of its road, yet this does not forbid their use by the public, but only requires that in their use the right of the public, under certain circumstances, shall be subordinate to that of the railway company. The traveler by placing himself or his horse and vehicle on the tracks of a street railway for any legitimate use of the street does not become a trespasser and will not become such unless he unreasonably and unnecessarily obstructs the company in the use of its tracks.¹

¹ *McFarland v. Consolidated Trac. Co.*, 204 Pa. 423 (1903); *McCracken v. Consolidated Trac. Co.*, 201 Pa. 378 (1902); *Jones v. Greensburg, Jeanette & Pittsburgh Ry.*, 9 Super. Ct. 65 (1898); *Hellrigel v. Southern Traction Co.*, 23 Super. Ct. 392 (1903.)

"The duties which regulate the rights of railway companies and those of the driver of private vehicles upon the streets or tracks are reciprocal and mutual. A street railway car has the right of way on its own tracks.

While city passenger railway companies have not an exclusive right to the use of the parts of the streets occupied by their tracks, they have a right to an unobstructed track for the passage of their cars. The convenience of the individual in the use of the part of the street to which the cars are confined must give way to the convenience of the public who use the cars. The use of electricity as a motive power by street railway companies, has greatly increased the danger to those who drive or walk on city streets. Many uses of streets which were formerly comparatively safe are now extremely dangerous. Of the increased danger all persons who use the streets must take notice, and a high degree of care is required of them.²

It cannot from the nature of the case leave its tracks, and therefore it is the duty of the drivers of other vehicles to get off the track in time to allow the car to pass, and to get off of it, if possible without unduly delaying the car or exposing either the persons in the vehicle, or the persons in the car to the danger of injury. The law requires reasonable care and diligence on the part of both parties under such circumstances. It is the duty of the driver of the vehicle, if he can, to turn out in time to avoid an accident. It is the duty of those in charge of the car to proceed at a reasonable rate of speed, at a rate of speed which will not endanger the safety of other people. It is also their duty when the car and the vehicle have come into dangerous proximity to signal their approach by sounding the bell or gong. If an accident happens in consequence of a car being driven at an unusual and dangerous rate of speed and which, except for its being so driven would not have happened or in consequence of the neglect or omission of any reasonable duty or precaution which ought to have been taken by the employees in charge of the car, and persons are injured, by that, and if such persons have themselves exercised reasonable care and diligence, and have not been guilty of any contributory negligence themselves, then the passenger railway company is answerable for that and must make just and adequate compensation to those who have been injured by their negligence. It is the duty of people who drive upon the track to be on the alert and to exercise reasonable care and diligence to get off the tracks when a car is approaching and to avoid a collision if it be possible to do so by getting off the tracks in time. A neglect to exercise such reasonable care and diligence in getting off the track with reasonable expedition, if it be in their power to do so, is such contributory negligence as will prevent a recovery against the company if an accident happens, either wholly or partly in consequence of such contributory negligence."³

² *Breary v. Traction Co.*, 5 Dist. 95 (1896) per Thayer, P. J.

³ *Gilmartin v. Lackawanna Valley Rapid Transit Co.*, 186 Pa. 191 (1898) per Fell, J.

A person who drives a team across or along an electric railway track is held to a higher measure of duty than if it were a track for horse cars. One purpose of the greater motive power is to increase the speed of the cars, and the right to run more rapidly necessarily follows from the nature and purpose of the power and the grant of the right to use it. But a corresponding obligation arises. He whose agencies increase the danger of travel on the highway assumes the duty of increased care and vigilance. The measure of care is thus increased on both sides; and the responsibility of each to the other is to be determined in the light of their relative rights and duties thus established. The right of railway companies to the surface of the streets covered by their tracks is superior to that of the public; the cars have the right of way thereon over private vehicles and pedestrians, and the latter must yield to this paramount right. But this higher right in no way absolves the company from the greater care cast upon it because of the increased speed of its cars on crowded thoroughfares. All have a right to use the streets for passage with reasonable concession to the rights, needs and conveniences of each other and regardless of the restrictions, facilities and purposes of the modes of travel employed. No one has an absolute exclusive right to any part of the streets.⁴

Electric street railway companies have not the exclusive use of their tracks, but in their use their rights are superior to those of the traveling public and their cars have the right of way. No one is warranted in assuming that if he first reaches the crossing he may go on and that the whole duty of care and vigilance is then cast on the motorman. The duty to look for an approaching car is an absolute duty and failure to do so is negligence per se. This duty is not performed by looking when first entering the street, but continues until the track is reached.⁵

Duties as to Care of Roadbed.

217. A street railway company in removing snow from its tracks must pay due regard to the rights of travel upon the

⁴ *Smith v. Philadelphia Trac. Co.*, 3 Super. Ct. 129 (1896.)

⁵ *Burke v. Union Traction Co.*, 198 Pa. 497 (1901.)

highway and must remove the snow in such a manner as not to interfere needlessly with the safety and convenience of persons lawfully using the street in an ordinary way. Where a load of hay was upset in the street without fault of the driver and whilst about driving his team across the street to hitch it to the load, without negligence on his part he slips on the sloping bank of hard snow, more than a foot high at the side of the track, caused by defendant's act, such pile of snow may be considered the proximate cause of the injury.⁶

In a case where plaintiff was thrown out of his wagon and injured, a verdict and judgment for plaintiff will be sustained where it appears that the plaintiff in driving on the tracks of the defendant was thrown from his wagon by the front wheel of the wagon slipping from the tracks and falling into a hole made by employees of the defendant, some weeks before the accident, in removing paving blocks and not replacing them.⁷

A street railway company which lets out the construction of its road and reserves no other control over the work than to approve or disapprove of it when completed, is not liable for personal injuries caused by the negligence of an employee of the contractor, as the latter is an independent contractor.⁸

Where a street railway company permitted the rails of its tracks to become loose and so worn that they would not hold spikes, and in consequence a wheel of a wagon is caught by the end of a rail which had become worn and split, and the driver of the wagon is injured, the case is for the jury. In this case the court said that the railroad company is "bound to know that use and climatic influences would produce defects in the rails," and it was bound to make such a continued inspection as would detect those which were apparent.⁹

Wanton Conduct of Employee.

218. A street railway company is not liable for an injury caused by the wilful and wanton conduct of an employee, not

6 *Stanton v. Scranton Trac. Co.*, 11 Super. Ct. 180 (1899.)

7 *Leary v. Electric Traction Co.*, 180 Pa. 136 (1897.)

8 *Thomas v. Altoona & Logan Valley Elec. Ry.*, 191 Pa. 361 (1899.)

9 *Gilton v. Hestonville, Mantua & Fairmount Pass. Ry.*, 166 Pa. 460 (1895.)

acting within the scope of his employment. Thus where a motorman in the employ of a street railway company leaves his car and commits an assault and battery upon one who is driving a team on the track of the company, the company is not liable.¹⁰

Killing of Animals.

219. The same degree of care is not required to save the life of a dog that would be required to save the life of a human being. Plaintiff was the owner of a very valuable St. Bernard dog which was run over on the public road near plaintiff's residence and killed. The evidence showed that the dog ran in front of the car and was dragged about fifty feet. The motorman testified that he saw the dog when it was about fifty feet away and when it was not on the track; that he did not see the dog go under the wheels, nor did he feel any motion of the car to lead him to believe any thing had been struck. The car slowed up but did not stop after striking the dog. The court directed a verdict for the defendant.¹¹

¹⁰ *Rudgeair v. Reading Traction Co.*, 180 Pa. 333 (1897.)

¹¹ *Furness v. Union Ry. Co.*, 6 Del. 246 (1895); 4 Dist. 784 (1895); 8 Kulp 103 (1895); 13 Lanc. 72 (1895.)

CHAPTER XXXII.

NEGLIGENCE—STREET RAILWAYS—COLLISIONS BETWEEN CARS AND WAGONS.

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| 220. At Street Crossings—Duty of Traveler. | 223. Turning to Cross Track Within Block. |
| 221. At Street Crossings—Contributory Negligence. | 224. Turning from or into Tracks. |
| 222. At Street Crossings—Cases for Jury. | 225. Wagon on Track. |
| | 226. Standing Wagon. |

At Street Crossings—Duty of Traveler.

220. If a person in attempting to drive across the tracks of a street railway company at a crossing with which he is familiar, and which he knows to be dangerous, neglects to look until his horse is upon the tracks, he is guilty of contributory negligence and cannot recover from the company.¹

The rule of "stop, look and listen," which applies to the crossing of steam roads, applies only in part to the crossing of street railways. A person in approaching the tracks of a street railway must look and listen for the approach of a car and if the street is obstructed it is his duty to listen and in some instances to stop. Thus where a person before driving over a bridge brought his team nearly to a full stop and looked, but did not see nor hear the car, it was for the jury to determine whether if he had come to a full stop and looked and listened, the accident might have been avoided.²

A person in approaching the tracks of a street railway operated by cable or electricity must look and listen for an approaching car. There is no settled rule that demands that he shall stop, nor does it appear desirable that there should be.

¹ *Trout v. Altoona & Logan Valley Electric Ry. Co.*, 13 Super. Ct. 17 (1900); *Potter v. Scranton Ry.*, 19 Super. Ct. 444 (1902.)

² *Jones Bros. v. Greensburg, Jeannette & Pittsburg St. Ry. Co.*, 9 Super. Ct. 65 (1898.)

There may be, however, situations in which ordinary care would require that he should stop as well as look and listen before attempting to cross. Thus where a person could not see an approaching car because of obstructions in the street and could not hear it because of noise, it is his duty to stop.³

A person in crossing the tracks of an electric railway company must look for an approaching car, and failure to do so is negligence per se. This duty is not performed by looking when first entering on the street but continues until the track is reached.

Plaintiff testified that he stopped his horse at a point about opposite the building line, and waited for a car on the track nearest him to take on a passenger. While waiting he saw a car on the further track approaching about a square away. When the car on the track nearest him started, he started his horse at a slow walk, but did not look again for the approaching car on the further track and was struck by it. It was held that binding instructions for defendant were proper.⁴

At Street Crossings—Contributory Negligence.

221. Where plaintiff's testimony established that at the time of the accident he was driving a team of horses and approached a street on which a single track was laid, which was used for travel in both directions, and at a steep grade; that when at a distance of twenty or thirty feet from the track, he looked up and down and saw no car in either direction; that he proceeded looking down, but not up the track until the front feet of his horses were across the first rail when he heard a whistle, looked up the grade and saw a car approaching; that he then attempted to swing his horses to the left, whereupon the off horse was struck and killed and the other horse seriously injured, it is proper to enter a judgment for defendant *non obstante veredicto*.⁵

Plaintiff in approaching a street having a double track rail-

3 *Omslaer v. Pittsburgh & Birmingham Traction Co.*, 168 Pa. 519 (1895); 26 Pitts. 15 (1895.)

4 *Moser v. Union Trac. Co.*, 205 Pa. 481 (1903); *Burke v. Union Trac. Co.*, 198 Pa. 497 (1901.)

5 *Potter v. Scranton Ry.*, 19 Super. Ct. 444 (1902); affirming 7 Lacka. 304 (1901.)

way upon it, checked his horse almost to a stop and looked as he reached the house line of the street and afterwards gave no further attention to the cars. He then drove on slowly thirty-two feet to allow a wagon to pass in front of him, and went directly in front of a moving car and was struck. If he had looked again after he was on the street he would have seen the car. Plaintiff described the accident as follows: "I went slow and let the wagon go past. Just as I reached the track, after I saw the wagon pass, I was going across and the glare of the car came up and I never saw it until I saw the light shining on the horse and it caught the wagon. . . . The glare of the light came on the horse. I simply looked out like that, and I could almost lay my hand on it when I saw it. . . . There was nothing in the world to prevent me from seeing it, but when I didn't see it, I didn't see it, that is all. Then I didn't look for it after that; I kept looking at the wagon." The court held that plaintiff was guilty of contributory negligence and could not recover.⁶

Although a person about to drive his team across a street railway track stops and looks at a point about twelve feet from the track, from which he could see a car for a quarter of a mile, he is nevertheless guilty of contributory negligence, which will preclude a recovery if in attempting to start his team he found it stalled and he then backed it ten or twelve feet, and without looking again drove upon the track and was struck by a car.⁷

If a person drives his wagon upon the tracks of a street railway company at a crossing, without looking for a car and without having his horse under control, he is guilty of contributory negligence and cannot recover for injuries sustained by reason of a collision with a street car.⁸

Plaintiff while driving at night a dark covered wagon, with no lamps lit, approached a street known by him to be traveled by trolley cars, along which he had, when he was seventy-five to one hundred feet to the nearest track an unobstructed view in the direction from which the cars approached for several

6 *Burke v. Union Traction Co.*, 198 Pa. 497 (1901.)

7 *Kern v. Second Avenue Traction Co.*, 194 Pa. 75 (1899.)

8 *Darwood v. Union Traction Co.*, 189 Pa. 592 (1899.)

hundred feet. It was very clear from the evidence that the plaintiff saw the car when he was fifty feet away from the track and that he saw it again just as he was about to go on the track, the car being then about fifty feet away. Plaintiff drove at a walk across the street, over thirty-three feet from the curb line to the track and drove directly in front of a swiftly approaching, heavily loaded car coming on a descending grade, and his wagon was struck by the car back of the front wheels. Plaintiff's contention was that though he looked and saw the car but a short distance away, as he was about to walk his horse upon the track, he could recover as he proved that the car was running "terrifically" fast, and that he continued his leisurely progress on the theory that the car was supposed to stop on the near side of the street. The car was stopped within a few feet of the accident. It was held that plaintiff was guilty of contributory negligence and that a non-suit was properly entered.⁹

If the testimony of the plaintiff shows that he drove on a street car track when no car was within 700 feet and that he could easily have crossed the track in safety, if his testimony was true, and the front wheels of his wagon were struck by a car, a non-suit is proper.¹⁰

Where a person driving a big, high-seated wagon with curtains down the sides, approaches a cross street on which a street railway is operated, it is his duty to be on the lookout for an approaching car and to continue to look until the track is reached, and a single glance "out from underneath the cover" of the wagon down the cross street for but fifty or seventy feet is a mere heedless glance, and not an adequate performance of his duty, and accordingly, if after such a glance, he sits back in the wagon, with the view of the cross street and the coming car cut off, satisfied he can cross the track without being struck, and does not look again and goes straight ahead and is struck by a car, he is clearly guilty of contributory negligence.¹¹

9 *Smith v. Electric Trac. Co.*, 187 Pa. 110 (1898); affirming 6 Dist. 471 (1897.)

10 *Mason v. United Trac. Co.*, 33 Pitts. 264 (1902.)

11 *Pieper v. Union Traction Co.*, 202 Pa. 100 (1902.)

Plaintiff while driving a two horse delivery wagon at a trot came into collision with a street car at a crossing. He testified that he looked and saw no car, and that he had his horse under control. The collision occurred before the wagon reached the tracks, being struck "between the horses' rear and the seat of the wagon." The car was lighted up in the usual manner and was only forty feet away at the time plaintiff said he looked. It was held that plaintiff was guilty of contributory negligence.¹²

Plaintiff while driving a wagon approached a street railway crossing. When at the building line of the street he looked for a car and saw one about four hundred and fifty feet away, approaching the crossing. He testified that he drove slowly twenty-eight feet to the track and looked a second time, when his horse was on the track, or about to step on it, and saw the car at the middle of the block. He drove on at a slow walk, and the front wheel of his wagon was struck within a half second from the time he looked. It was held that a non-suit was properly entered.¹³

At Street Crossings—Cases for Jury.

222. Plaintiff was injured by a collision between a car of defendant company and plaintiff's wagon. The evidence for the plaintiff, although contradicted, was to the effect that the accident occurred when the plaintiff was turning his wagon from one street into another; that before turning he looked and saw no car within a square; that the car which struck him was running at a very high rate of speed, and that its gong was not rung. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.¹⁴

Plaintiff was injured by a collision between his wagon and a car of the defendant company at a crossing of a double track railway. According to the plaintiff's testimony he approached the crossing in a careful manner, watching for a car in both

12 *March v. Union Traction Co.*, 209 Pa. 46 (1904.) In this case the court said: "To come to a right angled street crossing in the dark at a trot is in itself strong evidence of negligence."

13 *Mease v. United Traction Co.*, 208 Pa. 434 (1904.)

14 *Frame v. Electric Traction Co.*, 180 Pa. 49 (1897.)

directions; that while he looked before he arrived at the point beyond the house line where he could see, he also continued to exercise prudence and care after he reached this point, that when he had cleared the house line he first saw the approaching car; but before that time he had heard no bell or signal and had no reason to apprehend any difficulty in crossing; that at the moment when he first could and did see the car it was at least two hundred and twenty feet from him and his horses were about stepping over the track; that the car was running very fast and that the motorman was standing away from his brake and not looking ahead. Every material part of the plaintiff's testimony was contradicted by the evidence of the defendant. The court held that plaintiff's contributory negligence and the defendant's negligence were questions for the determination of the jury.¹⁵

A person about to cross a street at a regular crossing is not bound to wait because a car is in sight, if it is at such distance from him that he has ample time to cross if it is run at the usual speed. From the plaintiff's testimony it appeared that he was driving east on Cherry street, in the city of Philadelphia, and that when the front wheels of his wagon were on the foot crossing at Thirteenth street, he brought his horse nearly to a stop and looking south saw an electric car which had crossed Arch street, and which was about two hundred and fifty feet from him. Not noticing whether the car was in motion or standing, he drove forward and when his horse reached the tracks on Thirteenth street the car being close upon him and running with great rapidity he turned his horse up Thirteenth street, but was unable to avoid a collision with the car. There was evidence that the car was running at two or three times the usual speed of street cars, and that after it struck the plaintiff's horse and wagon it ran one hundred and fifty feet before it was brought to a full stop. It was held that the case was for the jury and that a verdict and judgment for plaintiff would be sustained.¹⁶

Two horses and a coupe belonging to the plaintiff were be-

¹⁵ *Hamilton v. Consolidated Traction Co.*, 201 Pa. 351 (1902.)

¹⁶ *Callahan v. Philadelphia Traction Co.*, 184 Pa. 425 (1898); *Hamilton v. Consolidated Traction Co.*, 201 Pa. 351 (1902.)

ing driven west on the north side of Diamond street, in the city of Philadelphia. When the carriage approached the intersection of Diamond and Second streets, the driver stopped, looked and listened, but seeing and hearing nothing, drove on until his horses were on the railway track. He then for the first time saw a rapidly approaching car only about fifteen feet distant coming from the north on Second street. The driver testified that he could not see the car as it approached because of a factory on the corner; that the defendant company had been in the habit of stopping its cars on the north side of Diamond street, and that he could not have driven nearer the track without blocking the footways. A number of citizens testified that they saw the accident, saw the car coming at an unusual rate of speed, and that it did not slow up on reaching Diamond street until it struck the carriage; that no bell or other warning was given, and that the horses and carriage were taken about thirty feet before the car was stopped, and then only by the bodies of the horses being under the wheels. The lower court entered a non-suit on the ground that the driver of the plaintiff was guilty of contributory negligence, but on appeal the judgment was reversed, as it was held that the case was for the jury.¹⁷

Where a person driving a loaded two horse wagon stops about ten or twelve feet from an electric railway at a public crossing, and sees a car approaching a considerable distance off at the usual rate of speed, and is then signaled by the company's watchman to cross the track, and in the act of so doing is struck by the car and injured, and several witnesses testify that the car was going at an unusual rate of speed, the person injured is entitled to sustain a judgment and verdict in his favor.¹⁸

Deceased was driving a two horse wagon over a street railway at a public crossing. As he was on the crossing a car collided with the wagon and killed the driver. In an action by his widow against the railway company, the evidence for

¹⁷ *Manayunk & Roxborough Boarding & Livery Stable v. Union Trac. Co.*, 7 Super. Ct. 104 (1898.)

¹⁸ *Haney v. Pittsburgh, Allegheny & Manchester Traction Co.*, 159 Pa. 395 (1893.)

the plaintiff, although contradicted, was to the effect that the car was run at a high rate of speed, that no signal was given, that the deceased looked and listened before going upon the track, and that obstructions of the view of the crossing made it a dangerous one. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.¹⁹

Plaintiff while driving a one horse, open wagon was injured in a collision with a car of defendant company at a point where its single track electric railway intersected the street on which he was traveling. Plaintiff testified that when about twelve or fifteen feet away from the track (from which place he could distinctly see both east and west along the track a distance of about 200 feet) he stopped his horse and looked in both directions, and there being no car in view, started forward on a good walk, at the rate of about four miles an hour, over a properly lighted street; that after the horse and forward part of the wagon had cleared the track, a rapidly moving car collided with a hind wheel. The negligence of the defendant company was established by the testimony of the motorman, who could easily have brought the car to a standstill if it had only been moving at the speed testified to by him.

The evidence in regard to the distance the plaintiff was from the crossing when he stopped, whether he stopped at all, the speed of the car, and the sounding of a gong, was contradictory.

It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.²⁰

Where there is evidence that an electric car was proceeding at an unusually rapid speed, that no bell was rung nor signal given, and that the car did not slow up until just at the time or immediately after a collision, the case in the absence of plaintiff's contributory negligence is for the jury.²¹

Plaintiff and two other persons while riding in an open wagon approached a street on which was a single track, on

¹⁹ *Greenfield v. East Harrisburg Pass. Ry. Co.*, 178 Pa. 194 (1896.)

²⁰ *Conyngham v. Erie Electric Motor Co.*, 15 Super. Ct. 573 (1901.)

²¹ *Flynn v. Wilkes-Barre & Wyoming Valley Trac. Co.*, 9 Kulp 28 (1897.)

which cars were run in both directions. The horse was on a slow trot, estimated at six miles an hour, and all three occupants of the carriage looked and listened for the approach of a car. When within nine feet of the house line the driver checked his horse, leaned over the dashboard and looked west for a car. From this point he could see the track for a distance of eighty feet west of the house line, and probably one hundred feet from his position in the carriage. He then looked east and turning again to the west saw a car thirty feet west of the crossing and about fifty feet from him. The horse had not come to a full stop and was then so near the track that the driver in order to avoid a collision, turned abruptly to the east and drove rapidly in the direction in which the car was moving. He was unable to keep ahead of the car or to get the carriage off the track before he was overtaken by the car. The car was a water car, used for sprinkling streets, and was running at the rate of twenty or twenty-five miles an hour, and no notice was given of its approach to the crossing. It was held that the case was for the jury and a verdict and judgment for plaintiff was sustained.²²

Turning to Cross Track Within Block.

223. If a person is injured by reason of the wagon in which he was riding being negligently turned to cross the track when the car was but a short distance away, and the motorman as soon as he discovered the wagon did everything possible to stop the car, the company is not liable.²³

The driver of a wagon who is injured by being struck by an electric car in attempting to cross defendant's double track railway can not recover damages for his injuries, where a witness for the plaintiff who saw the accident testified that plaintiff did not look when he turned his horses from the street to the track where he was struck, and plaintiff's own testimony as to the distance at which he saw the car when he turned was shown to be incorrect by actual measurement, in

²² Haas v. Chester Street Railway Co., 202 Pa. 145 (1902); 16 York 12 (1902); 8 Del. 397 (1902.)

²³ Kane v. Peoples Pass. Ry., 181 Pa. 53 (1897.)

connection with the highest speed of the car mentioned by any of the witnesses.²⁴

Plaintiff driving a wagon attempted to cross a street railway track in front of an approaching trolley car. Plaintiff testified that he saw the car at a distance of 330 feet, and continued his progress with his horse at a walk, believing that the car was sufficiently far away to enable him to cross safely. The car of defendant company, just before it struck the plaintiff, descended upon a rapidly descending grade and plaintiff testified that the motorman did not have his hands on the brake nor sound the gong.

It was held that the court erred in entering a non-suit, as the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.²⁵

The plaintiff was driving a pair of farm horses attached to a farm wagon along Ohio street, in the city of Allegheny, where the defendant company operated a double track electric railway. He was proceeding in the rear of two other wagons on the south side of the street next to the curb and desired to turn north on Cedar avenue. Before reaching the intersection of the two streets he attempted diagonally to cross Ohio street, and in so doing was compelled to cross both of the tracks of defendant company. Plaintiff testified that before starting he looked in both directions and saw no car on the south track, but did see one on the north track, about 300 feet distant. After driving on the track he saw that a collision was inevitable and struck his horses with the whip, and the car struck about the middle of the wagon.

It was held that plaintiff was guilty of contributory negligence and could not recover for damages sustained by collision with the street car.²⁶

Plaintiff, with his wagon loaded with lumber, in attempting to cross the defendant company's tracks in the middle of a block, was struck by one of defendant's cars and injured. Plaintiff testified that before starting his team he looked and

²⁴ *Bornscheuer v. Consolidated Trac. Co.*, 198 Pa. 332 (1901); affirming 30 Pitts. 344 (1900.)

²⁵ *Raulston v. Philadelphia Traction Co.*, 13 Super. Ct. 412 (1900.)

²⁶ *Brown v. Pittsburg, Allegheny & Manchester Trac. Co.*, 14 Super. Ct. 594 (1900.)

listened and saw about 321 feet away a car approaching toward him. Thinking that he could cross in front of the car he started his team and drove diagonally across the tracks of the trolley company and did not look again until the car was practically upon him.

The court reversed a verdict and judgment for plaintiff on the ground that plaintiff was guilty of contributory negligence.²⁷

Plaintiff's wagon, which was being driven diagonally across defendant's tracks at a point about 120 feet from the crossing, was struck by a car of defendant company and damaged. It appeared that the accident occurred before daylight, and that the electric street lights were burning, as was also the headlight of the car. The referee found that plaintiff could have seen the approaching car had he looked, at least a block away, and that the failure to look and listen before driving across the track was contributory negligence for which there could be no recovery. On appeal the report of the referee was confirmed.²⁸

The duty of a person driving along a street in a cart loaded with lumber placed crosswise upon it and projecting in front of it to the head of his horse, with a trolley track to the right of him, over which a car might come at any moment, is to look forward and to keep in the road, wide enough to do so, at a safe distance from the track; and if he looks backward at a team trying to pass him and permits his horse to run into a car and is injured he cannot recover.²⁹

If a person at the side of a street not at a crossing, sees two cars approaching each other from opposite directions on the two tracks, attempts to cross both tracks at a point between the cars and is struck and killed by one of the cars, he is guilty of negligence which will preclude a recovery.³⁰

Plaintiff drove a two horse team from a hotel yard out upon

27 *Cupps v. Traction Co.*, 13 Super. Ct. 630 (1900.)

28 *Keib v. Scranton Trac. Co.*, 2 Lacka. 71 (1896.)

29 *Morrow v. Delaware County & Philadelphia Elec. Ry.*, 199 Pa. 156 (1901.)

30 *Meyer v. Pittsburgh, Allegheny & Manchester Traction Co.*, 189 Pa. 414 (1899.)

an avenue forty feet wide. The defendant company had two tracks upon the street and a space of more than twelve feet was left upon each side between the curb and the nearest rail. When the plaintiff drove out of the yard he stopped his team, with the front wheels resting in the gutter. He looked up and saw a car approaching from the north on the track furthest from him. He testified that he thought the car was far enough away to permit him to drive across both tracks before it reached him. He therefore started his team to go directly across, and when his front wheels were on the furthest track the wagon and car collided, causing injury to the plaintiff. There was nothing to put the motorman on notice of any impending collision until the horses had actually stepped upon the track upon which the car was approaching. It was held that the plaintiff was guilty of contributory negligence and could not recover.³¹

A collision occurred on a country road upon which the tracks of the defendant were laid, between a car and a wagon which plaintiff was driving. The east rail of the north track upon which the car ran into the team was ten feet from the open gateway of a country residence. The plaintiff testified that on the day of the accident he had delivered ice cream at the residence and when leaving the property stopped his team, a one horse wagon, inside the gateway, and that the distance from the horse's head to the entrance was about fifteen feet; that his seat in the wagon was about ten feet from the horse's head; that the wagon was a closed one all the way to the front; that he had climbed out on the swingletree of the wagon far enough to get clear of the curtains and look down the road; that after he had so looked, no car being in sight, he climbed back into his wagon, took up the lines, walked his horse out of the premises and did not see the car until he was in the center of the track and his wagon was struck. At the point within the gate where the plaintiff stopped to look—a distance of about thirty-five feet from the track—he had an unobstructed view of three hundred and nineteen feet in the direction from which the car was coming and there was nothing to obstruct this view until the track was reached. It was held that a non-suit was

31 *Tyson v. Union Traction Co.*, 199 Pa. 264 (1901.)

properly entered. Brown, J., in discussing the rule as to looking before crossing railway tracks in the country, said: "It is urged that the rule that one about to cross a street railway track must continue to look until the track is reached relates only to electric roads in cities, and does not apply to the crossing of such railway tracks in the country where the views are much more extended, cars pass less frequently and the obstructions to travel on town streets are not encountered. The answer to this is that care must always be exercised. The degree required may vary, but want of care under the circumstances is always negligence. It is as much one's duty to look out for danger in the country as it is in the town. Trolley cars run into wagons carelessly driven, not only on the streets of a city, but on turnpikes and rural roads as well. We have never said that the duty of continuing to look until the trolley or street railway track is reached is not binding upon those driving teams in the country. The same degree of watchfulness may not be required there as on crowded streets, but it will never be held that there need be no care at all in the country."³²

Plaintiff's horses, which were hitched to a wagon carrying a party of excursionists, while attempting to cross the defendant's tracks were struck by a trolley car. Plaintiff's evidence tended to show that he "stopped, looked and listened," and that his horses were struck by the car approaching at the rate of thirty-five miles an hour. Defendant's testimony tended to show that the wagon was visible for a long distance from the car; was going in the same direction, and that turning suddenly made an attempt to cross the tracks without any effective attempt to stop, look and listen, and also that the motor-man had the current off, and brake on and had sounded his bell.

It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.³³

In an action by plaintiff against a traction company to recover damages for personal injuries caused by the alleged

³² Keenan v. Union Traction Co., 202 Pa. 107 (1902.)

³³ North Broad Safe Deposit & Storage Co. v. Chester, Darby & Philadelphia Ry., 6 Super. Ct. 204 (1897); 7 Del. 108 (1897.)

negligence of a motorman in running into plaintiff's wagon when he was attempting to drive across the defendant company's tracks at a point in a block, the case should be submitted to the jury where the evidence was conflicting as to whether the defendant's car was properly lighted, whether the gong was sounded, and whether the speed of the car was unusual and unsafe.⁸⁴

Plaintiff while driving a pair of horses attempted to cross the tracks of the defendant company. There was evidence tending to show that there was ample time to make the crossing, but that he was compelled to stop by a woman, and subsequently by a wagon. He pulled out of the way as soon as possible, but in so doing was struck by the defendant's car. The defendant company alleged that the plaintiff had attempted to make a crossing in front of an approaching car; that it should have been clear to him that he could not safely cross the track; that the car was approaching slowly and that the motorman did his best to stop the car.

It was held that the case was for the jury, and on appeal the court sustained a verdict and judgment for the plaintiff.⁸⁵

Turning From or Into Tracks.

224. Plaintiff and her sister were driving an open, one horse spring wagon on the west-bound track in a street. As they approached a side street they were warned by a car following them to turn out. Plaintiff testified that they could not go forward on the track because of an open manhole immediately in front of them, nor could they turn off to the right because that side of the avenue was blocked with wagons; and they were therefore compelled to turn out to the left across defendant's east-bound track. As they turned off the west-bound track on which they had been driving they saw an east-bound car of the company approaching them at a point west of the side street; that the plaintiff was looking towards the approaching car, and the motorman in charge thereof did not ring his bell nor apply the brake, or give them time to cross the track, and

34 *Tompkins v. Scranton Traction Co.*, 3 Super. Ct. 576 (1897.)

35 *Wilson v. North Side Traction Co.*, 10 Super. Ct. 325 (1899.)

that the car struck the wagon, injuring plaintiff. The plaintiff was corroborated by her sister and another witness. The defendant offered evidence in conflict with this. It was held that it was for the jury to say whether the motorman was negligent in not stopping his car in time to prevent the collision, and that it was also for the jury to say whether there was any contributory negligence.³⁶

Plaintiff was driving a wagon on the west-bound track of a street railway at a time when there were piles of snow between the tracks and the sidewalk. As a car approached him from behind he turned into the eastbound track, and after the car had passed he went on for about twenty-five feet, when he turned to go into the west-bound track, but before he could do so his wagon was struck by a car on the east-bound track, running at a very high rate of speed. It appeared that a wagon on the west-bound track, immediately behind a car which had passed, was what prevented plaintiff from turning sooner into the west-bound tracks. It was held that the case was for the jury.³⁷

A driver of a wagon upon reaching a street upon which were double tracks with street cars approaching from both directions drove across both tracks, and proceeded along the far track ahead of the car on that track. He then suddenly pulled into the other track so as to meet a car moving at a moderate speed head on, and too close for it to be stopped. It was held that the driver was guilty of contributory negligence.³⁸

Plaintiff was injured by reason of a collision with one of defendant's cars. Plaintiff's evidence, although contradicted, showed that plaintiff was driving a wagon on defendant's east-bound track. In order to avoid another wagon, coming in from a side street, he turned into the west-bound track just as an approaching car on that track had stopped. Before his wagon could clear the track the car was started "at pretty good

36 *Lenkner v. Citizens Traction Co.*, 179 Pa. 486 (1897); 28 Pitts. 11 (1897.)

37 *Harper v. Philadelphia Traction Co.*, 175 Pa. 129 (1896.)

38 *Lyons v. Union Traction Co.*, 209 Pa. 72 (1904.)

speed," and struck the plaintiff's wagon. It was held that the case was for the jury.³⁹

Plaintiff was driving along one of the tracks of a street railway company at night. In order to let a car behind him pass, he turned into the other track, intending to return when the car had passed. The car overtook him at the foot of a steep hill, but stopped a moment to take on passengers. He proceeded up the hill, and when the car was beside his wagon another car, coming at a high rate of speed, suddenly came into view from the other side of the hill and in front of him on the track on which he was driving and ran into his team. He could not turn to the right because of the car beside him, nor to the left because there was but four feet of space between the track and the curb. It was held that the case was for the jury.⁴⁰

Where a light wagon turns off one track of a street railway company to avoid a heavy wagon, followed by a cable car running at a high rate of speed, and the heavy wagon turns off at the same time and interferes with the light wagon, so that the latter is struck by the cable car before it completely gets off the track, the question of the street railway company's negligence is for the jury. "If the speed of the car was a dangerous and negligent one, the natural consequence was that on a much travelled street, those in peril would obstruct each other's movement in an attempt to escape. This was one of the very contingencies which the defendant was bound to foresee and avoid by due care; for it would be the natural and probable result of high speed."⁴¹

Plaintiff's evidence was that while driving a loaded wagon, he turned out of one of the tracks upon which he had been driving, and attempted to cross diagonally the other track, and in doing so was struck by a car on the other track. He further showed that he would have had sufficient time to get over if the car had been running at its usual rate of speed, but

39 *Julius v. Pittsburgh, Allegheny & Manchester Traction Co.*, 184 Pa. 19 (1898); 28 Pitts. 456 (1898.)

40 *Cannon v. Pittsburg & Birmingham Traction Co.*, 194 Pa. 159 (1899.)

41 *Thatcher v. Central Traction Co.*, 166 Pa. 66 (1895); 25 Pitts. 321 (1895.)

that the car was running at an unusually high rate of speed. It was held that the case was for the jury.⁴²

Plaintiff's evidence, although contradicted on all material points relating to defendant's negligence, tended to show that at the time of the accident she was riding in a wagon which was being driven on a track of defendant company, and which was followed by a car going in the same direction on the same track. The driver of the wagon, being warned by a signal from the car behind, started to cross the other track in order to enter a street opposite, and to the left of the point where he then was, when he was struck by a car coming on the other track at a very high rate of speed, the motorman of which was not looking ahead, but was looking sideways at the car passing him. It was held that it was for the jury to determine whether the speed of the car was excessive and whether the motorman was alert and attentive and had his car under proper control.⁴³

The plaintiff's team, hitched to a heavily laden wagon, was going northward on Front street between Bainbridge and Catharine streets, in the city of Philadelphia, and when about midway of a long square collided with the defendant's electric car going in an opposite direction. There was evidence that the driver did all in his power to leave the track upon seeing the car approach, and that the motorman instead of looking ahead was looking to the side, attracted by some New Year "shooters," while the car itself was running very fast. It was held that the case was for the jury. The court said:

"While no doubt there is more reason to apprehend danger in traveling in an opposite direction to that of the cars, and therefore a greater degree of care is demanded, yet this is not unlawful in itself; it but furnishes an additional element for consideration in determining the question of the driver's negligence."⁴⁴

In an action for damages for injuries sustained from being struck by a car of the defendant company, it appeared from

42 *Jackson v. Pittsburgh, Allegheny & Manchester Traction Co.*, 159 Pa. 399 (1893.)

43 *Boyles v. Monongahela Street Ry. Co.*, 20 Super. Ct. 443 (1902.)

44 *Smith v. Philadelphia Traction Co.*, 3 Super. Ct. 129 (1896.)

the evidence that the plaintiff, in order to allow a car to pass him, pulled his team off the track on to the outbound track. After he had gone a short distance he saw a car coming toward him and he pulled back onto the inbound track and was struck in the rear by a car of the defendant company. Plaintiff testified that he heard no bell; that before turning on to the track "he turned around and couldn't see no car because the one car just passed me." The car was running at the usual speed and there was no evidence that the motorman could have stopped. The court refused to take off the non-suit, as there was no proof of negligence on the part of the defendant company.⁴⁵

Where, in an action against a street railway company, plaintiff's evidence disclosed that he drove deliberately out of a driveway in the middle of a block into an avenue, upon which there were two tracks; that he looked and saw an approaching car about three-quarters of a block distant when the front wheels of his dearborn wagon were at the curb, some sixteen feet from the track; that he then turned slowly to the west, and instead of keeping clear of the track, swung over the first rail, whereupon his horse was almost instantly struck and plaintiff injured, the court will reverse a verdict and judgment for plaintiff on the ground of his contributory negligence.⁴⁶

Where a person who was driving a buckboard wagon, about nine o'clock in the morning, on one of the tracks of a double track railway, turned and drove upon the other track without looking for an approaching car, which he could have seen for a long distance ahead if he had looked, and his wagon was struck by a car at the instant its front wheels came upon the track there can be no recovery against the company.⁴⁷

Plaintiff's horse was killed and his wagon damaged by reason of a head-on collision with one of the cars of defendant company. The accident occurred on a rainy night, about eleven o'clock. There were two tracks on the street, plaintiff's wagon being on the left hand track, going against the

⁴⁵ *Kohuka v. Pittsburg & Birmingham Trac. Co.*, 32 Pitts. 336 (1902.)

⁴⁶ *McPhillips v. Union Traction Co.*, 19 Super. Ct. 223 (1902.)

⁴⁷ *Boehmer v. Pittsburg, Allegheny & Manchester Trac. Co.*, 194 Pa. 313 (1900.)

course of the cars, and was heavily loaded with lumber, and of unusual length and unwieldy, and was drawn by two wheel and two lead horses and accompanied by two men and a boy. One of the men was driving the horses. In attempting to turn out from the left track the wheels became locked, and the wagon was dragged with the horses at an angle to the right for a distance of some 350 feet, when it was struck by an approaching car, which had its headlight burning. Although at the place of the accident the street was lighted with electricity, the uncontradicted testimony of the motorman was that an electric light hung over the street in such a manner that he was unable to see the wagon until after passing the light. There was no light upon the wagon. The evidence showed that at the time of the accident one of the men accompanying the wagon was busy seeking something with which to throw the wagon wheels from the tracks, while the other man, who was driving the horses, saw the approaching car, but gave no warning to the motorman. There was evidence that the detention of the wagon upon the track was caused in part at least by the worn condition of the tires of the wagon.

It was held that as the plaintiff's employees failed to exercise due care under the circumstances, they were guilty of contributory negligence, and that the court committed no error in giving binding instructions for defendant.⁴⁸

In an action against a street railway company for injuries sustained by the plaintiff while crossing the tracks of the defendant, the railroad company may show its own gross negligence in running the car which caused the accident at an unusual high speed, for the purpose of showing the danger to which the plaintiff exposed himself in attempting to cross the tracks; but, at the same time, plaintiff is entitled to the benefit of the admitted or proved facts, so far as they have any bearing on the question of defendants' negligence.⁴⁹

Wagon on Track.

225. Where the driver of a wagon was killed in a collision

⁴⁸ *Jackson v. United Traction Co.*, 18 Super. Ct. 211 (1901.)

⁴⁹ *Jackson v. Pittsburgh, Allegheny & Manchester Traction Co.*, 159 Pa. 399 (1893.)

with a car of defendant company, and the evidence for the plaintiff tended to show that the deceased was driving on a street railway track and that the motorman of the car which struck the wagon from behind, saw the wagon or could have seen it within a time sufficient to have stopped the car and prevented the accident, the case is for the jury.⁵⁰

Plaintiff was injured while driving along defendant's tracks by being struck by one of its cars. At the place of the accident the street was very narrow and the two tracks of the defendant occupied the entire cartway. There was also a curve near the place. Plaintiff was driving a one horse wagon on the right hand track, when he was warned by a car from behind to get off the track. He turned on to the adjoining track and proceeded at a slow trot for about two squares, when he was struck by a car coming in the opposite direction along the track into which he had turned. The car on the right hand track stopped twice between the place where the plaintiff left that track and the place of the collision, a distance of six or seven hundred feet, and at the time of the accident had overtaken plaintiff. Plaintiff alleged that the bell was not rung as the car approached, and that the car was only visible for about twenty-five feet on account of a bank, the curve and intervening poles. It was held that the immediate locality was a place of danger, calling for the exercise of such care as would probably prevent a collision, and that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. A verdict and judgment for plaintiff was sustained on appeal.⁵¹

Plaintiff was driving a two horse bakery wagon along a township road which was occupied by a trolley track. The night was dark and very foggy and although there was ample roadway outside of the single trolley track, he used the track because the roadway was rough. Plaintiff testified that he was looking front and listening, and that a car running at a high rate of speed, without any headlight and without sounding a gong approached from the opposite direction and was not seen

⁵⁰ *Woelfel v. Federal Str. & Pleasant Valley Pass. Ry.*, 183 Pa. 213 (1897.)

⁵¹ *Hellriegel v. Southern Trac. Co.*, 23 Super. Ct. 392 (1903.)

by him until about fifteen feet away, so that before he could drive from the track the wagon and car met in a head-on collision.

It was held that the exact place and exact time when the plaintiff should have turned from the track was a question for the jury, and that a verdict and judgment for plaintiff would be sustained.⁵²

Plaintiff while driving along the highway, noticed a vinegar jar in his wagon had overturned, and while leaning forward to reach it with his right hand, transferred the lines to his left, and while in this position his horse swerved from the driveway and he found himself with the wheels of his wagon between the ruts of defendant's track, and in attempting to get out the hind wheel of his wagon, a car suddenly came along at a high rate of speed and without warning, struck the wagon. It was held that the case was for the jury.⁵³

Plaintiffs were injured by a collision of a car of defendant company with a buggy, in which plaintiffs were driving. It appeared that at the point where the accident occurred, the defendant's double track street railway occupied practically the entire width of the township road; that the outside track was in a dangerous condition, unsafe for travel, either by cars or other vehicles, and that this necessitated plaintiffs to drive on the inside track, and while so driving, on a dark night, drove directly into the front of a moving electric car. There was also uncontradicted evidence that the car was running on an ascending grade at such a speed as to carry the horse, buggy and occupants 100 feet.

It was held that the fact that the horse and buggy were carried 100 feet was evidence of negligence, as the circumstances of the road and track were such as to demand extreme caution on the part of defendant.⁵⁴

Plaintiff was driving a covered wagon on a township road, which was occupied by the defendant company with two tracks, so that it was necessary for a person riding in a wagon to be partly on one of the tracks. The car came into collision with

52 *Kaechele v. United Traction Co.*, 15 Super. Ct. 73 (1900.)

53 *Davidson v. Schuylkill Trac. Co.*, 4 Super. Ct. 86 (1897.)

54 *Gress v. Braddock & Homestead Str. Ry.*, 14 Super. Ct. 87 (1900.)

the wagon shortly after rounding a slight curve in the road. The evidence for plaintiff tended strongly to show that the car was run at a very high rate of speed, and plaintiff testified that he heard no bell. Witnesses for the defendant testified that the bell was rung, but their evidence varied as to the distance from the curve at which it was rung. It was held that the case was properly left to the jury on the questions of negligence on the part of defendant and contributory negligence on the part of the plaintiff.⁵⁵

Plaintiff was driving a wagon on a track. Immediately behind him was a carriage. An electric car struck the carriage and drove it into the wagon with such force as to throw plaintiff to the ground and injure him. A charge in effect that plaintiff could only recover if both the driver of the carriage and the motorman were jointly negligent was held to be proper.⁵⁶

Where by reason of a street railway company's negligence in backing a car, it became necessary for a motorman of another car, in order to avoid injury to the car and its passengers to run into plaintiff's team and destroy it, the doctrine of proximate cause can not be invoked by defendant to relieve it from responsibility.⁵⁷

The case is for the jury where plaintiff's evidence tended to show that decedent's wagon was struck just as it was leaving the track, while defendant's evidence as testified to by the motorman, tended to show that the wagon was driven upon the track just before it was struck.⁵⁸

Where the gripman of a cable car runs his car at a very high rate of speed, at a point where he is likely to meet wagons, and it appears that he could not have stopped the car until it reached a point three hundred feet beyond the point where it collided with the wagon, the question of the street railway company's negligence is for the jury.⁵⁹

In a case where the issue turned on the speed of a car the

55 *Gaughan v. Second Avenue Traction Co.*, 189 Pa. 408 (1899.)

56 *Comey v. Phila. Traction Co.*, 175 Pa. 133 (1896.)

57 *Kissock v. Consolidated Trac. Co.*, 15 Super. Ct. 103 (1900.)

58 *Thompson v. Peoples Trac. Co.*, 180 Pa. 114 (1897.)

59 *Thatcher v. Central Traction Co.*, 166 Pa. 66 (1895.)

court said: "It is the duty of a passenger railway company to run its cars, by day and by night, with or without headlights, in such manner, as to speed and attention, as not to imperil the safety of others who may be lawfully, and with due care, using the roadway. The degree of care required for this purpose necessarily varies with the circumstances. Under some conditions, arising from the character of the region traversed, the grade of the track, and the various surroundings, a rate of speed permitting the stoppage of the car at a point within the range of its headlight, or even at a shorter distance, may be necessary, while under different conditions this rate may safely be exceeded."⁶⁰

Standing Wagon.

226. A plaintiff in an accident case testified that he hitched his horse and wagon near the curb-stone of a street, at a point where there was not room enough for a car to pass without striking the wagon, and that a motorman, disregarding his signal to stop the car until he could unhitch his horse, drove the car into the wagon, and caused the injuries complained of. The evidence for the company tended to show that there was sufficient room for the car to pass, but that the horse became frightened, and turned the wagon so that it was struck by the car. It was held that a judgment and verdict for the plaintiff should be sustained.⁶¹

The driver of a wagon, having heavy packages to deliver at a store, was compelled, by reason of obstructions in the street, and on the pavement in front of the store, to back his wagon to the curb so that his horse stood on the track of a street railway company. Shortly after backing his wagon, one of the defendant's cars approached at an excessive speed, without giving a signal and with the team in full sight of the motorman struck the wagon and killed the driver. It was held that the question of deceased's contributory negligence

60 *Jensen v. Philadelphia, Morton & Swarthmore Street Railway Co.*, 24 Super. Ct. 4 (1903), per Smith, J.

61 *Kestner v. Pittsburgh & Birmingham Traction Co.*, 158 Pa. 422 (1893); *Kaechele v. United Trac. Co.*, 15 Super. Ct. 73 (1900); *Mulvey v. Roxborough, Chestnut Hill & Norristown Ry.*, 18 Montg. 16 (1901.)

and the company's negligence was for the jury. On appeal a verdict and judgment for plaintiff was sustained.⁶²

Plaintiff was injured while engaged with a one horse transfer wagon in unloading a piano, weighing about 1200 pounds, from a wagon. Before starting to unload he waited for two street cars to pass, and then when no other car was in sight, he backed his wagon against the curb with the horse standing on the tracks, and started to unload the piano. It appeared that this was the universal manner, under the circumstances of unloading pianos. It further appeared that in order to protect his horse and wagon from a possible collision he sent a man down the street to signal any car that might approach. A car of defendant came along at an unusual speed, without sounding any warning. The motorman, although having an unobstructed view of the horse and wagon for three or four squares and though given a notice to stop, which he heard, continued his course and struck the horse and wagon, injuring the plaintiff. It was held that the case was for the jury, and a verdict and judgment for plaintiff was sustained.⁶³

Plaintiff was seated in a wagon which was standing on the track of the defendant's road on Fifth avenue, near Smithfield street, Pittsburg. In front of him were two cars, the nearest being about ten feet in advance of his horses, and a car was back of him, close to his wagon. On another track a car stood to his left and to his right the street was crowded with people, so that he was completely hemmed in. As the second car in front of him moved across Smithfield street, on an ascending grade, the trolley wheel slipped from the wire and the car stopped and then slipped backward about sixty feet and struck the car back of it. Either the force of the collision drove the rear car against the plaintiff's horses and wagon, or the motorman of that car moved it backward to avoid a collision. It was held that the case was one in which the proof of the accident and the attendant circumstances gave rise to a presumption of negligence against the company and made it incumbent upon the defendant to show that due care had been

⁶² *Fenner v. Wilkes-Barre & Wyoming Valley Traction Co.*, 202 Pa. 365 (1902.)

⁶³ *McFarland v. Consolidated Trac. Co.*, 204 Pa. 423 (1903.)

used, and whether this was shown was for the jury to determine.⁶⁴

Where plaintiff showed that a car of defendant company backed down a track where his team was properly located from a point where the danger, if not the absolute certainty of collision ought to have been foreseen by those in charge of the car, the case is for the jury.⁶⁵

64 *Campbell v. Consolidated Traction Co.*, 201 Pa. 167 (1902); see *Kissock v. Consolidated Traction Co.*, 15 Super. Ct. 103 (1900.)

65 *Kissock v. Consolidated Trac. Co.*, 15 Super. Ct. 103 (1900.)

CHAPTER XXXIII.

NEGLIGENCE—STREET RAILWAYS—FRIGHT OF HORSES.

227. Fright of Horses.

Fright of Horses.

227. A street railway company is not liable for personal injuries resulting from the fright of a horse, caused by the ordinary operation of the cars. It is only when the fright is caused by the running of the car at an extraordinary rate of speed that the company is liable, and the burden is upon the plaintiff to establish such rate of speed. The proof should show either that the car was moving at an unusual rate of speed, or at a rate which was not reasonably prudent or at a definite rate in miles per hour, which would of itself show it was excessive, or at a rate greater than was allowed by the municipal ordinance.¹

No presumption of negligence arises against a street railway company from the mere fact that plaintiff's horse became frightened by the breaking of a trolley wire, in consequence of which plaintiff was injured by being thrown or jumping from the wagon, when neither the wire nor any sparks emitted from it touched the horse, wagon or plaintiff. The burden of proof in such a case is on plaintiff to establish negligence on the part of defendant by affirmative proof.²

Plaintiff was driving a restless and frightened horse and was standing up in the wagon trying to control it. At a distance of about forty feet before he met the car it was prancing and very restless and he signalled the motorman. The motorman testified that he saw plaintiff in the way about ten feet ahead of him, and did not see him before that. It was held that the case was for the jury.³

¹ *Yingst v. Lebanon & Annville St. Ry.*, 167 Pa. 438 (1895.)

² *Kepner v. Harrisburg Trac. Co.*, 183 Pa. 24 (1897.)

³ *Kelly v. Pittsburg & Birmingham Trac. Co.*, 10 Super. Ct. 644 (1899.)

Plaintiff's horse was killed and his wagon and its contents damaged by the alleged negligence of the motorman of defendant. Plaintiff's driver testified that when about seven or eight feet from defendant's tracks and seventy-five yards from the approaching car he undertook to drive across the track; that the headlight caused his horse to balk and that he hallooed to the motorman to stop. It further appeared that the car was behind time, and was running recklessly, and that the motorman said that he was "going to make up the time if he had to run through something." It was held that a verdict and judgment for plaintiff should be sustained.⁴

Plaintiff was driving a wagon between defendant company's track and the curbstone, while a car was approaching him on a down grade from the opposite direction. When the car was about ten feet from plaintiff's horse the latter suddenly sprang across the track in front of the car and a collision occurred in which plaintiff was injured. It was held that a compulsory non-suit was properly entered.⁵

In an action against a street railway company for the negligent killing of a horse, the case is for the jury where the rider of the horse, although contradicted by four witnesses, and not corroborated, testified that as he was riding the horse along the tracks of a street railway company the horse for some unaccountable reason ran sideways on the track, when the car which afterwards struck him was at a distance of between one hundred and twenty and one hundred and fifty feet away, and that although he was making every effort to get off the track in full view of those operating the car, the car notwithstanding the peril of the horse and rider was permitted to run him down, although it might have been stopped within forty feet.⁶

Plaintiff while riding in a sleigh, approached a sweeper. His horse, when within about sixty feet of the sweeper, became frightened and plaintiff jumped out of the sleigh and motioned for the sweeper to stop; after it had stopped he led the horse by in safety to a point some fifteen or sixty feet

⁴ *Ward v. Lakeside Railway*, 20 Pa. C. C. R. 494 (1898.)

⁵ *McManigal v. South Side Passenger Railway Company*, 181 Pa. 358 (1897.)

⁶ *Byrne v. Montgomery & Chester Elec. Ry.*, 19 Super. Ct. 531 (1902.)

ahead, and when about to mount the sleigh the sweeper started and the horse took fright and ran away, it was held that the case was for the jury.⁷

In an action for personal injuries caused by a horse taking fright and backing a cart into a trolley car, plaintiff alleged, as the only negligence of the company, that the car was running at a very rapid and unlawful rate of speed, and he testified that the car was running "not less than fifteen miles an hour." The motorman testified that on discovery that the horse was frightened he shut off the power and applied the brake and that the car was "just merely crawling along," when the horse suddenly turned round and backed the cart against it. His testimony was corroborated by that of the conductor and three mounted policemen, who were approaching and near to the scene of the accident at the time of its occurrence. The court reversed a verdict and judgment for plaintiff on the ground that plaintiff failed to establish any negligence on the part of the defendant.⁸

Where a motorman is confronted by a sudden and immediate danger, he is not guilty of negligence if he fails to do what after mature deliberation, would have seemed to a prudent man to be the wisest thing under the circumstances. Plaintiff, riding a runaway horse, when from sixty to eighty feet from the crossing of a street, saw a car going south on the intersecting street, about to cross the street upon which the plaintiff was riding. As soon as he saw the motorman he called to him to stop the car. The motorman, either did not hear, or if he heard, elected to cross, and the horse ran into it, causing the plaintiff's injury. It was held that the testimony failed to show any evidence of negligence on the part of the motorman, and a verdict and judgment for plaintiff was reversed.⁹

Plaintiff, riding a five-year-old horse, bareback, northward on Edgemont avenue, was overtaken by defendant's car and the horse collided with the front corner of the car, was thrown

⁷ *Obold v. United Trac. Co.*, 19 Super. Ct. 326 (1902.)

⁸ *Smith v. Holmesburg, Tacony and Frankford Electric Ry. Co.*, 187 Pa. 451 (1898.)

⁹ *Phillips v. Peoples Pass. Ry. Co.*, 190 Pa. 222 (1899.)

and, in falling on the plaintiff, broke his leg. The evidence as to the negligence of the company was contradictory, there being evidence tending to show that the car was going at a rapid rate of speed, faster than the condition of things at this point justified, and that the motorman was in a position to see the condition of the horse and rider, and by slackening his speed could have prevented the accident. It was held that the case was for the jury.¹⁰

Plaintiff, using a carriage bridle with blinders, was riding bareback a young horse upon a wide avenue on which were two street car tracks. As he approached a street crossing the horse became frightened and went down the tracks, rearing and plunging. Plaintiff turned the horse off the track and a car passed by him. The horse then became more unmanageable and ran by the car, plunging and leaping abreast of and ahead of the car, and when about the middle of the square, wheeled around, faced the car, reared and stumbled, throwing the plaintiff over his head onto the roadway in front of the car, which was then a short distance off, but which was stopped before reaching him. From the evidence it appeared that the gong was sounded at the cross street and several times after passing that street, and that the horse was nervous and excited before the car appeared. The court held that there was not sufficient evidence to submit the case to the jury and reversed a verdict and judgment for plaintiff.¹¹

Where a person is in distress by reason of a frightened horse and gives signals to the motorman on an approaching car, the latter should regard the signals and avoid a collision, if he has ample time and space to do so.¹²

A horse that plaintiff and his wife were driving on a west-bound track, becoming frightened by the whistle of a locomotive, shied on to the east-bound track, where it ran for some distance. Plaintiff's wife made signals to a motorman of a car approaching on the east-bound track, but he did not slacken

¹⁰ Clayton v. Chester Trac. Co., 3 Super. Ct. 107 (1896); see also 6 Del. 495 (1896.)

¹¹ McKinney v. United Trac. Co., 19 Super. Ct. 362 (1902.)

¹² Mulvey v. Roxborough, Chestnut Hill & Norristown Ry., 18 Montg. 16 (1901.)

the speed of his car, which was coming at a rapid rate, although he had ample opportunity to do so, and the buggy was struck and plaintiff's wife killed. It was held that the case was for the jury.¹³

Plaintiff's horse and wagon stood on the street, near the curb—the horse being tied to a telegraph pole. A mare was tied to the rear of the wagon on the side next the curb. The plaintiff stood close by the mare on the side next the street. A car of defendant company approaching from behind at a speed of twenty miles an hour, blew the plaintiff's hat off against the mare, causing the animal to jump and throw her hind feet around near the track, where the fender of the car struck her.

It was held that the fright of the horse was the proximate cause; the speed of the car, the breeze thereby created and the blowing of the plaintiff's hat against the animal were remote causes and therefore the railway company could not be held liable for the injury to the horse.¹⁴

A horse took fright at an approaching car and shied off to one side of the trolley track. The motorman of the car, distant about one hundred and fifteen feet, saw the plaintiff and assumed that he was about to drive across the tracks. The horse, however, became unmanageable and refused to move, and as soon as the motorman saw that the driver could not get off the tracks, he shut off the power and put on the brakes, but before he could stop the car the horse was struck and plaintiff was thrown and injured. The car stopped almost immediately after it struck the horse. It was held that a non-suit was properly entered.¹⁵

If a driver attempts to stop his team, and they come almost to a full stop, and then become headstrong and walk on the tracks directly in front of a car, there can be no recovery.¹⁶

If a street railway company has the right to maintain an electric line it has the right, of course, to repair the line from

13 *Waechter v. Second Avenue Traction Co.*, 198 Pa. 129 (1901.)

14 *Davison v. Wilkes-Barre & Wyoming Valley Traction Co.*, 10 Super. Ct. 442 (1899.)

15 *Lee v. Schuylkill Valley Trac. Co.*, 13 Montg. 91 (1897.)

16 *Harman v. Pennsylvania Trac. Co.*, 200 Pa. 311 (1901); 18 *Lanc.* 361 (1901.)

time to time and to use all necessary and ordinary appliances in doing so. Thus a street railway company is not liable for injuries resulting from the fright of a horse at an elevated appliance used in repairing trolley wires.¹⁷

A railway company is not liable for an accident resulting from sudden noise and disorder on the part of a body of passengers. Thus where by the sudden outburst of a party of excursionists on a trolley car, a well-broken horse, not afraid of such cars as generally conducted, became frightened and ran away, the company is not liable. The company was under no obligations to provide its cars with policemen to prevent unusual conduct on the part of the passengers, and the failure of the conductor and motorman to stop the noise was not such proximate cause of the injury as to render the company liable.¹⁸

Plaintiff was driving a sleigh on a dark night along a street upon which a street railway company operated a railway. When the sleigh was one hundred and fifty to two hundred feet from an approaching car the horse backed upon the track. Plaintiff succeeded in getting him off, and when moving on the outside of the track, and when the car was about fifty feet away, he hallooed and shouted to the motorman to slow up. Just at this time the horse backed upon the track again, and a collision occurred in which the plaintiff was injured. The evidence showed that the car was running about four miles an hour, that the motor was in proper order, and the headlight properly lighted. The car was under control and stopped within fifteen feet after it struck the sleigh. It was held that binding instructions for defendant were proper.¹⁹

17 *Potter v. Scranton Traction Co.*, 176 Pa. 271 (1896.)

18 *Boatwright v. Chester and Media Elec. Ry.*, 4 Super. Ct. 279 (1897); see also 6 Del. 558 (1897.)

19 *Dunkle v. City Pass. Ry.*, 209 Pa. 125 (1904.)

CHAPTER XXXIV.

NEGLIGENCE—STREET RAILWAYS—PEDESTRIANS.

- | | |
|---|-------------------------------------|
| 228. Crossing Tracks—Contributory Negligence. | 230. Walking on Tracks. |
| 229. Crossing Tracks—Cases for the Jury. | 231. Injuries from Poles and Wires. |

Crossing Tracks. Contributory Negligence.

228. If a person, before stepping upon the tracks of a street railway company, fails to stop and look, he is guilty of contributory negligence for which there can be no recovery.¹

Plaintiff, pushing a baby coach in which was a little child, attempted to cross the tracks of a street railway. She succeeded in safely crossing the tracks, but was stopped by a pile of dirt halfway between the car track and flagging. She was unable to roll the carriage over the pile of dirt and started to recross the tracks. As she came back on the track, the front wheels of the carriage being also on the track, she heard the bell of an approaching car about half a square away. She got off the track, pushed the carriage off also, changing its course, and without looking where she was going, moved backward and fell into a man-hole, while the car was still in motion, although it stopped at a distance of ten to fifteen feet away from the crossing. It was held that plaintiff was guilty of contributory negligence and could not recover.²

The fact that a person has stopped, looked and listened before he has gone upon street railway tracks, does not excuse his want of ordinary care while crossing the tracks. Thus if a person looks and listens before going upon the tracks, but when he is on the second track hears a noise and turns to as-

¹ *Lumis v. Philadelphia Traction Co.*, 181 Pa. 268 (1897); *Biglin v. Scranton Ry. Co.*, 4 Lacka. Jur. 285 (1903.)

² *Lumis v. Philadelphia Traction Co.*, 181 Pa. 268 (1897.)

certain the cause, and is struck by a car, he may be charged with contributory negligence.³

Where the undisputed testimony showed that a pedestrian at the instant he set foot on the track was struck and killed; that the car was well lighted, with a headlight on the end, and was plainly visible to any one about to cross the street; that there was no obstruction of any kind to his view; and that the deceased did not stop, look or listen for any approaching car after leaving the curb, he is guilty of contributory negligence and there can be no recovery for his death.⁴

If a person sees a car on the track in front of him, but nevertheless attempts to cross the track and is injured by striking the side of the car by his own movement, he is guilty of contributory negligence and cannot recover for his injuries.⁵

Plaintiff, about fifty or sixty feet west from a crossing, stepped from the curb and walked briskly toward the other side, thinking she could pass safely in front of an approaching car; she, however, miscalculated either her own speed or that of the car and was struck as soon as she stepped upon the track. It was held that plaintiff was guilty of contributory negligence, which would prevent her recovery.⁶

Plaintiff, an old woman in full possession of her faculties, was injured in crossing the tracks of the defendant company. It appeared that her view of the approaching car was unobstructed; that the instant she put her foot on the track she was struck by the car and that she did not look for approaching cars. The speed of the car which struck the plaintiff was ordinary.

It was held that plaintiff was guilty of contributory negligence and could not recover for her injuries from the defendant company.⁷

A person who is struck by a car of a street railway company in crossing its tracks, cannot relieve himself of the charge of

3 *Rauscher v. Philadelphia Traction Co.*, 176 Pa. 349 (1896.)

4 *Watkins v. Union Traction Co.*, 194 Pa. 564 (1900.)

5 *Walsh v. Hestonville, Mantua & Fairmount Pass. Ry.*, 194 Pa. 570 (1900.)

6 *Sweeney v. Scranton Trac. Co.*, 5 Lacka. 86 (1898.)

7 *McCauley v. Philadelphia Traction Co.*, 13 Super. Ct. 354 (1900.)

contributory negligence by proving the unlawful speed of the car where the car was within his view just before he reached the track if he looked. If he looked he must have seen that it was approaching at high rate of speed and could not rely upon the presumption that its speed was lawful and take the chance of crossing ahead of it. If he looked, he saw it, and was negligent in attempting to cross, and if he did not look it was negligence in him not to do so.⁸

Where a person, on a rainy day, starts to cross a street on which are laid the double tracks of a railway company, having twice seen the car which she desired to take, the view of which was unobstructed, goes ahead holding her umbrella in such a way as to obstruct further view of the car, and was struck by the car when she was about in the middle of the last track, it is not error for the court to give binding instructions for defendant.⁹

A person who had full opportunity to see an approaching car and to avoid contact with it, but who nevertheless attempted to cross the track without stopping, looking or listening and was struck the instant he stepped upon the track, cannot recover.¹⁰

Plaintiff was injured while crossing over Market street, at Fifteenth street, about eight o'clock in the evening. At the time of the accident plaintiff was somewhat affected by drinking, according to the testimony of those who saw him. Plaintiff testified that he stood upon the south side of the street railway tracks, on the west crossing, and looked up and down Market street to see if he could safely cross. He saw some wagons directly in front of him on the southern or east-bound track. He also saw a car approaching from the west, at what he considered a safe distance from the crossing. As soon as the wagons moved out of his way, he started to cross, and without looking for a car approaching from the east, he crossed the southern track and the space between the tracks, and while upon the northern track was struck by a west-bound car and injured. The testimony showed that he stepped upon the

8 *McCracken v. Consolidated Traction Co.*, 201 Pa. 378 (1902.)

9 *Holmes v. Union Traction Co.*, 199 Pa. 229 (1901.)

10 *Sullivan v. Consolidated Traction Co.*, 198 Pa. 187 (1901.)

northern track some six or seven feet in front of a slowly moving car. The motorman instantly hallooed to him. The car was well lighted and provided with an automatic bell but the motorman did not have sufficient time after seeing the plaintiff to stop the car in time to prevent the accident. It was held that plaintiff could not recover.¹¹

A person is guilty of contributory negligence and cannot recover for his injuries, if after alighting from a car, he immediately steps around behind it onto the other track in front of an approaching car without stopping, looking and listening.¹²

Crossing Tracks—Cases for the Jury.

229. Street railway cars must be kept well in hand, and the speed must not be so great as to make this impossible or to endanger the safety of the public using the streets with reasonable care. The same rules as to speed that may be applied to ordinary vehicles propelled by horses, are not applicable to street cars. The greatest rate of speed consistent with the safety of other persons using the street or highway may be maintained, and the court cannot say that any rate of speed that does not transcend these limits is negligent or should be submitted to the jury as sufficient to justify a verdict against the railway company.¹³

Plaintiff's evidence, although contradicted, tended to show that he was engaged in laying cement between the rails of a street railway; that immediately before the accident he had procured a shovelful of cement and before stepping on the track, had stopped, looked and listened, and seeing no car near, went upon the track and while stooping over his work and depending upon the car to warn him, was struck by a car coming at a high rate of speed without sounding its bell. It was held that the case was for the jury.¹⁴

From the testimony presented by the plaintiff, it appeared that the car which struck and killed his wife was running at the rate of eighteen or twenty miles an hour over a public

11 *Nugent v. Philadelphia Traction Co.*, 181 Pa. 160 (1897.)

12 *Gray v. Fort Pitt Trac. Co.*, 198 Pa. 184 (1901.)

13 *Kline v. Electric Trac. Co.*, 181 Pa. 276 (1897.)

14 *O'Malley v. Scranton Traction Co.*, 191 Pa. 410 (1899.)

crossing in a populous city, which was double the ordinary speed of cars on the avenue. No notice of the approach of the car to the crossing was given and no attempt was made to check its speed, or to stop it until the instant of the collision. It ran one hundred and eighty feet after the collision. When at the curb the deceased stopped and looked in the direction of the car. The car was then two hundred and possibly four hundred feet from the crossing. She had but thirteen feet to walk in order to clear the track. She was struck by the car when within one step of being fully across. It was held that whether under the circumstances she acted with ordinary care and prudence was a question for the jury, and a verdict and judgment for the plaintiff was sustained.¹⁵

Plaintiff was run over by one of defendant's cars while attempting to cross from the north side to the south side of Frankstown avenue, at Station street, in the city of Pittsburgh. It was not disputed that the distance from the north track to the curb of Frankstown avenue was seven feet and six inches. A large covered wagon was standing in such a position between the north track and the curb as to obstruct the view of the north in the direction from which the car came which struck plaintiff. Plaintiff's version of the accident was as follows: "I started to cross the street, and stepped down off the curb and as I stepped off the curb I saw a car coming towards Wilksburg. I stopped until it left off its passengers and went on. Then I went to start to go across the street, and I looked towards town and then I looked towards Wilksburg, but I couldn't see for a wagon, so I listened and I thought there was nothing coming and I started to cross the street, and when I got within a step or so of the track, the car came, and I had no chance to turn or nothing, and I just threw up my hands." A witness for the plaintiff testified that it was about the middle of the car that she threw her hands up so that the back wheels of the car passed over her legs.

The evidence as to the speed of the car and whether a signal was given was conflicting. The lower court submitted the case to the jury, who rendered a verdict for plaintiff, and

upon appeal the court, being equally divided in opinion, affirmed the judgment.¹⁶

In an action against a street railway company to recover damages for the death of plaintiff's husband, who was run over by defendant's car, it appeared from the testimony that at the time of the accident the defendant's car was running after dark on a declining grade on a road which passed along the top of an embankment. Between the tracks of the railway and the edge of the embankment was a foot path covered with cinders, and varying in width from four to six feet. At the outer edge of the path was a guard rail, supported by posts. The roadbed was in an unfinished condition. The earth which had been thrown out in making an excavation for the track had not been replaced, the ties were exposed, and the rails projected above the surface of the road. The plaintiff's husband, when last seen before the accident, was on the footpath eighty or ninety feet from the car. A lineman in the employ of the defendant company, who was riding on the front platform, was seen to jump from the car and run forward in advance of it. The speed of the car was not checked until it was brought to a sudden stop, when the deceased was found behind the car, his legs having been run over, and the lineman having hold of him. It was held that as inferences of the company's negligence could be drawn the case was for the jury.¹⁷

If a person about to cross a street stops, and a street car also stops just before reaching the crossing and the motorman and the foot traveler each apparently expects the other to wait, and then both start so nearly together that a collision is unavoidable, the case is for the jury.¹⁸

If a person before crossing a double line of tracks, while standing on the curb looked in both directions and saw no car in sight, there being an unobstructed view of the track for almost 300 feet to the west, and was struck while crossing the east-bound track, about the middle of the track by a car run-

¹⁶ *Miller v. Consolidated Traction Co.*, 201 Pa. 175 (1902.)

¹⁷ *Coll v. Easton Transit Company*, 180 Pa. 618 (1897.)

¹⁸ *Cleary v. Pittsburg, Allegheny & Manchester Traction Co.*, 179 Pa. 526 (1897); 28 Pitts. 65 (1897.)

ning at the rate of twenty miles an hour, the case is for the jury.¹⁹

Plaintiff, a man of eighty-two years, in attempting to cross the tracks of defendant was killed by a car of defendant company. The evidence tended to show that when deceased started to cross from the north to the south side of Penn avenue, he was looking for the cars, that when he started to cross, a west-bound car was one block away and an east-bound car was one and a half blocks away; that his attention was especially directed to the car nearer him, the bell of which was ringing distinctly; that after crossing the first track and while between the tracks, or when about entering upon the east-bound one, he was struck by an east-bound car which approached rapidly without sounding its bell.

It was held that the question of defendant's negligence and deceased's contributory negligence was for the jury.²⁰

The husband of plaintiff, while attempting to cross defendant's double tracks, which were laid in the center of an unusually broad street, with a space between of six feet, was struck by a car and killed. The deceased attempted to cross from the north to the south side of the street; just as he left the curb a car approached on the north track, the one next him, running westward; he stopped about four feet from the track, and as soon as the car passed, without stopping for an instant, started to cross the intervening six feet to the other side of the tracks, and was struck by a car running eastward on the south track. If he had stopped for a moment on the track to look, the car on the other track would have passed him, or if he had stopped but a moment on the space between the tracks he would have seen the car coming and could have prevented the accident. It was held that deceased was guilty of contributory negligence and that there could be no recovery for his death.²¹

A foot passenger crossing a street, especially a wide one upon which double tracks of a street railway company are laid, does not perform his whole duty by a single look before start-

¹⁹ *Thorn v. Traction Co.*, 12 Dist. 226 (1903); 28 Pa. C. C. R. 410 (1903.)

²⁰ *Shaughnessy v. Consolidated Traction Co.*, 17 Super. Ct. 588 (1901.)

²¹ *Blaney v. Electric Traction Co.*, 184 Pa. 524 (1898.)

ing. A woman stopped at the curb of the street and looked before starting to cross. The car that subsequently struck her was then approaching at a distance of 185 feet. After standing there for some time and while crossing the track she was struck by the car. It appeared that the evidence was conflicting as to the speed of the car and its distance from the woman immediately before she stepped on the track. The court held that the question of the contributory negligence of the woman was for the jury.²²

Where in an action to recover damages for the death of a man who was run over by a street car, it appeared that a lineman in the employ of the company jumped off the front platform, where he was riding, and ran ahead and after the car had passed was found to have hold of the body of the deceased, which was still upon the railroad track, it is proper to admit in evidence as part of the *res gestae* the declarations of the lineman made immediately after the accident and before the body had been removed from the tracks, to the effect that he had run ahead to pull the deceased off the track and did not have time to do it. It is likewise proper in such a case to admit in evidence as part of the *res gestae* a declaration of the motorman made within two minutes after the accident and while he and other employees were in charge of the body, to the effect that he could have stopped the car, but that he supposed that the lineman who had jumped from the car and ran ahead would have the deceased removed from the track before the car reached him.²³

Walking on Track.

230. If a person walks on the track of a traction company to avoid a dusty carriage way and an uneven sidewalk and is injured by being struck by a car he is guilty of contributory negligence and cannot recover damages for his injuries. A woman returning home at night chose to walk along the track of defendant company because the surface there was hard and smooth, while the carriage way was dusty and the sidewalks uneven in many places. She knew that a car was coming be-

²² *McGovern v. Union Trac. Co.*, 192 Pa. 344 (1899.)

²³ *Coll v. Easton Transit Company*, 180 Pa. 618 (1897.)

hind her and frequently looked back to see whether it was near her. She testified: "I looked back every second because I knew the car was coming. . . . I walked just at a medium gait. . . . I was watching for the car going south, and I knew the danger I was in." She was struck by the car when she was within four doors of her home, but which she could not hear by reason of the noise caused by a train passing over an overhead bridge. It was held that plaintiff was not entitled to recover.^{23*}

Plaintiff, returning to his home at night, while voluntarily walking along a street car track to avoid some mud in the paved portion of the street was run down and injured by an electric car of defendant company, coming from behind him. The street was well lighted and plaintiff was perfectly familiar with the locality and its surroundings. It was held that he was guilty of contributory negligence and could not recover damages for his injuries.²⁴

A person who could have seen an approaching car, and who exposed himself to danger by placing his person within the lines required for the passage of the car, is guilty of contributory negligence.

Plaintiff was invited by a friend who was riding in an open platform wagon, to ride with him. In order to reach the vacant seat at the left of his friend, plaintiff walked back over the sidewalk the distance of the length of the wagon, then into the street, past the rear end of the wagon, looking up and down the street meantime for approaching cars and seeing none, proceeded without stopping and went up on the left hand side of the wagon two or three steps to a point opposite the front wheel, between the wagon and the easterly rail of the defendant's railway track and stood there with his back toward the rail for about half a minute, and was struck by defendant's car as he was in the act of climbing into the wagon, the court held the plaintiff guilty of contributory negligence.²⁵

23* *Gilmartin v. Lackawanna Valley Rapid Transit Co.*, 186 Pa. 193 (1898.)

24 *Penman v. McKeesport, Duquesne & Wilmerding Ry.*, 201 Pa. 247 (1902); affirming 31 Pitts. 264 (1901.)

25 *Flynn v. Wilkes-Barre & Wyoming Valley Trac. Co.*, 9 Kulp 28 (1897.)

A non-suit is proper where plaintiff left a place of safety and placed himself in a position of danger by going immediately in front of an approaching car in order to get into his wagon.²⁶

One of plaintiff's horses lost a shoe while they were being driven west on the north street car track of Arch street, between Eighth and Ninth streets, in the city of Philadelphia. Plaintiff, after his horse dropped the shoe, drove on some twenty-five yards, pulled off to the right and got off his wagon. After waiting for a west-bound car to pass, he walked in the space between the tracks to the horse shoe, and when in the act of picking up the shoe, was struck by a moving car on the east-bound track. It was held that he was guilty of contributory negligence, and could not recover.²⁷

A person who finds himself in sudden peril through no fault of his own and does what a prudent man would not do under other circumstances, is not held under the law to the same strict accountability that he would be if he was not in peril, but if the perilous position in which he finds himself is the result of his own act, he is not relieved from exercising ordinary care.²⁸

Injuries from Poles and Wires.

231. Where a person, not a passenger, is injured by the alleged negligence of a street railway company, no presumption of negligence arises from the mere happening of the accident, and plaintiff is bound to prove affirmatively negligence on the part of the company. The case is for the jury where one of plaintiff's witnesses testifies, although contradicted by several of defendant's witnesses that the accident was caused by a trolley pole catching in a loop of wire, thus pulling a street pole down upon the plaintiff.²⁹

Plaintiff, while standing at a street corner, was struck in the face by the falling of a trolley wire. It appeared that a disabled car was being pushed by another car behind it, and

²⁶ *Dorwart v. Pittsburgh Ry. Co.*, 34 Pitts. 183 (1903.)

²⁷ *Dix v. Ridge Avenue Pass. Ry.*, 15 Super. Ct. 350 (1900.)

²⁸ *Gray v. Fort Pitt Trac. Co.*, 198 Pa. 184 (1901.)

²⁹ *Bamford v. Pittsburg & Birmingham Trac. Co.*, 194 Pa. 17 (1899.)

at a point where defendant's line was crossed by another at right angles, the trolley pole of the disabled car jumped its own wire, struck and broke the wire of the cross line, and thus caused the accident. There was testimony that the proper course under such circumstances was to tie down the trolley pole of the disabled car and that the conductor was told by the conductor of the rear and operating car to do so, but he refused or neglected. It was held that the court was right in refusing binding instructions for defendant as the case was clearly for the jury.³⁰

A person who was injured while walking on the highway by the breaking of a wire cable used by a street railway company to control the movements of its cars on a steep decline, may recover damages from the company where the evidence shows that the cable had been weakened by use and exposure, that it had once before broken, and that on the morning of the accident it had been hastily repaired and used without testing its strength. In such a case it is proper to admit evidence that a director of the road had prior to the accident been notified of the defect in the cable.³¹

A team of horses were killed by stepping on a live electric wire. Prior to the accident it appeared that an oil derrick had blown down and had torn from the pole the uninsulated trolley and telephone wires, which were strung on the poles. A high current was passing through the wires at the time. A car of defendant arrived after the accident and the conductor and motorman turned the car and went back to the power house, about two miles distant, without leaving any warning at the scene of the accident, and reported the situation to those in charge of the power house, but the current was not turned off for almost an hour afterward. In the meantime plaintiff's team, driven by his son, approached the place and the horses came in contact with the telephone wires. It was held that the case was for the jury, and that a verdict and judgment for the plaintiff would be sustained.³²

³⁰ *Schenkel v. Pittsburg & Birmingham Traction Co.*, 194 Pa. 182 (1899.)

³¹ *Musser v. Lancaster City Str. Ry. Co.*, 176 Pa. 621 (1896); 13 *Lanc.* 369 (1896.)

³² *Sorrell v. Titusville Elec. Trac. Co.*, 23 *Super. Ct.* 425 (1903.)

CHAPTER XXXV.

NEGLIGENCE—STREET RAILWAYS—BICYCLES.

232. Bicycles.

Bicycles.

232. Although the Act of April 23, 1899, which gives to riders of bicycles the same rights as persons using carriages drawn by horses, and a city ordinance which gives vehicles on passenger railways going in the direction that the cars travel the right to the track when they meet vehicles going in the opposite direction, if a bicyclist riding between the tracks of a street railway company and proceeding in the same direction as the cars meets the driver of a cart approaching in the opposite direction, and each thinking that he has a right of way, keeps on his course, and the wheelman, when it is too late to turn off safely, attempts to leave the tracks and is struck by the wagon and injured, he is guilty of contributory negligence and cannot recover damages for his injuries from the owner of the cart.¹

It is the duty of a bicyclist about to cross a street railway to look as he approaches the track, and if there is any obstruction to stop and listen, and his neglect to do so is negligence per se. This is an unbending rule to be observed at all times, and under all circumstances. No question arises as in the case of steam railroads as to the proper place to stop, look and listen. If a person looks just before he crosses he avoids all danger of accidents.²

Plaintiff, a boy of nine years, while riding on his tricycle was injured in attempting to cross defendant's tracks at a point where there was no regular crossing. The evidence for the plaintiff, although contradicted, showed that he looked and

¹ Taylor v. Union Trac. Co., 184 Pa. 465 (1898.)

² McCracken v. Consolidated Traction Co., 201 Pa. 378 (1902.)

saw one car pass and then started to cross, but became bewildered as he saw another car coming and was struck before he could get off the track. He testified that the car was coming at a very great rate of speed, that no gong was rung and that the car was not equipped with a guard. It also appeared that as he started across there were wagons either on the track or on the side of the road. It was held that the case was for the jury.³

It is the duty of a rider of a bicycle who is riding between the tracks of a trolley company to regulate his course so as not to collide with the driver of a heavy cart who is approaching in an opposite direction.

Plaintiff was riding his bicycle between the rails of defendant company; a cart driven by a servant of the defendant was proceeding down the middle of the street in the street car tracks in an opposite direction. Plaintiff and the driver of the cart kept on their course, each thinking that the other would turn out, until plaintiff, when it was too late, in attempting to turn off the tracks was struck by either the cart or horse and injured. It was held that plaintiff was guilty of contributory negligence and could not recover from the owner of the cart.⁴

Plaintiff, a bicycle rider, because of the muddy condition of the road at the side of the track, rode onto a street car track in front of a car going in the same direction as he was and continued on the track for about one hundred and forty feet without looking back to see where the approaching car was. When he got within ten feet of an asphalt pavement he undertook to turn off from the track and was run into by the car. The court held he was guilty of gross negligence, and in refusing to take off the non-suit said: "While there was nothing wrong in him being on the track, he had a right to be there if it was safe to be there; the street car had a prior right to the track, and it was his duty to get off the track and give way to the street cars, and not expect the street car to stop because he was on the track. Bicyclers should not expect the car to

3 Phillips v. Duquesne Trac. Co., 183 Pa. 255 (1897.)

4 Taylor v. Union Traction Co., 20 Pa. C. C. R. 238 (1897); 6 Dist. 365 (1897.)

stop while they get out of the way, they should keep out of the way and not run the risk of accident.”⁵

There was evidence that a boy, mounted on a bicycle, came from a small street about midway in a block, intending to turn in a certain direction, but was obliged by reason of a wagon to keep on facing the car and in attempting to turn back, and at the same time to dismount his bicycle struck the car. It appeared that the motorman, as he reached the crossing, looked east then west, and that while his eyes were turned to the opposite side of the street to see if any one was approaching, the bicyclist came from behind the wagon, which was close to the track, and struck the car. It was held that evidence of undue speed was not sufficient to submit the case to the jury, as the speed had nothing to do with the accident and that the company was entitled to binding instructions.⁶

A verdict and judgment for defendant will be affirmed where it appeared that a bicyclist came suddenly and unexpectedly upon the track in front of a car coming at a reasonable rate of speed, and that the motorman did all in his power to stop the car, but that the close proximity of the car to the plaintiff when he attempted to cross the track ahead of it made the collision inevitable.⁷

5 *Bacon v. Consolidated Trac. Co.*, 30 Pitts. 431 (1900.)

6 *Gould v. Union Trac. Co.*, 190 Pa. 198 (1899.)

7 *Sauers v. Union Traction Co.*, 193 Pa. 602 (1899.)

CHAPTER XXXVI.

NEGLIGENCE—STREET RAILWAYS—PASSENGERS.

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| 233. Presumption of Negligence. | 238. Alighting from Car—Contributory Negligence. |
| 234. Riding on Platform. | 239. Alighting from car—Cases for Jury. |
| 235. Riding on Side Steps of Summer Car. | 240. Evidence. |
| 236. Injury at Open Window. | |
| 237. Getting on Car. | |

Presumption of Negligence.

233. Where an accident on a street car is connected with the means of transportation, a presumption of negligence arises against the company and in favor of a passenger who is injured.

Thus where a cable car is stopped so suddenly as to throw a passenger from his seat, and to break the glass in the car windows, the company is presumably negligent.¹

The fact of a casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer or that it is necessary to offer. The accident, the injury, and the circumstances under which it occurred are in some cases sufficient to raise a presumption of negligence and thus cast upon the defendant the burden of establishing his freedom from fault.²

If an accident happens to a passenger while he is in his proper place in the car, a presumption of negligence arises against the company. Plaintiff, a passenger in a street car, was injured by the pole of a wagon entering the car and striking his leg. The motorman testified that he was going up grade on a very dark, misty night at the rate of about three miles an hour; that the track in front of him was clear, but that he did not see the wagon on the opposite track until a short

¹ *Clow v. Pittsburgh Traction Co.*, 158 Pa. 410 (1893.)

² *Dixey v. Philadelphia Trac. Co.*, 180 Pa. 401 (1897.)

distance from him, when he put on the brake, but could not stop in time to avert the accident. Plaintiff's witnesses testified that the horses had turned off the track and brought the tongue of the wagon towards the other track, when the car was a considerable distance away, that owing to a collision with another wagon crossing in front of it, the driver was unable to bring the horses back to the track and that he called out to the motorman to warn him of the danger. It was held that the evidence of the defendant was not sufficient to overcome the presumption of negligence arising from the accident.³

The presumption of negligence arising from the happening of an accident to a passenger in a railway car while in her seat, is not defeated by the fact that the passenger in a suit for damages undertakes to prove a specific defect in the brake appliance of the car as the cause of the accident.⁴

A woman was a passenger on a street car which was attached to a cable car. Being unable to find a seat she stood in the passageway, holding to an overhead strap. She testified that the car ran roughly and after she had ridden a few squares, seemed to jump and leave the track and to be pulled back again by the forward car, and she and the other passengers were thrown backward and forward and plaintiff injured. It was held that the case was for the jury.⁵

Where a passenger is injured in a collision between two cars of the same company, there is a presumption of negligence, casting upon the carrier the onus of rebutting it, and it is immaterial that the collision was not due to any defect in the car on which the plaintiff was riding, but to a broken appliance on the car that ran into it.⁶

A car of defendant company in which plaintiff was a passenger, was stopped in front of lowered safety gates at a crossing at a time when a train was passing. Suddenly and without any apparent cause the electric current came on, the car

3 *Steele v. Consolidated Trac. Co.*, 30 Pitts. 290 (1900.)

4 *Wood v. Roxborough, Chestnut Hill & Norristown Pass. Ry.*, 12 Montg. 155 (1896.)

5 *Dixey v. Philadelphia Trac. Co.*, 180 Pa. 401 (1897.)

6 *Palmer v. Warren Str. Ry.*, 206 Pa. 574 (1903); *Madara v. Shamokin & Mount Carmel Electric Ry.*, 192 Pa. 542 (1899.)

plunged through the safety gates and collided with the rear end of the train, and plaintiff was injured while attempting to jump from the car. It was held that plaintiff could recover for her injuries as the defendant company was clearly guilty of negligence.⁷

Plaintiff, while a passenger, was injured on a car of defendant company. The uncontradicted evidence showed that at the place of the accident the bed of the street had been dug out for the purpose of changing the track from the old horse car system to the kind of track required for the electric system. New rails were being laid and in order to continue travel while the work was progressing, the old rails and the new were kept in a condition of temporary union at the ends, so that the cars could pass from the rails of the one system to those of the other. At the time of the accident the car had passed from the new rails and was on the old rails. There was quite a depression in the bed of the road, caused by the excavation which had been made, and into this depression the front wheels of the car dropped with such force as to throw the passengers with considerable violence from their positions on the seats. The plaintiff's head was dashed against the fare-box or the side of the car, and she received severe contusions and lacerations of the head and face. The court held that as the accident was not an inevitable accident or act of God, which could not have been foreseen or provided against, the case was for the jury.⁸

Plaintiff, a girl nineteen years of age, was injured while riding at night on one of defendant's cars. The trolley pole of the car became displaced, the car suddenly stopped, the lights in the car were extinguished and the car left in darkness. While the car was thus standing on the track, another car following it ran into it from the rear, causing her to either sit or fall down violently by reason of which the coccyx of her

7 *Willis v. Second Avenue Traction Co.*, 189 Pa. 430 (1899.)

If a passenger on the train is injured by such a car the burden of proof is upon the person injured to show that the street railway company was negligent.—*Todd v. Second Avenue Trac. Co.*, 192 Pa. 587 (1899.)

8 *Smedley v. Hestonville, Mantua & Fairmount Pass. Ry.*, 184 Pa. 620 (1898.)

spine was injured. No proper precautions to warn the car following were taken by either the motorman or conductor. It was held that the plaintiff could recover damages for her injuries.⁹

In an action by a passenger against a street railway company, it appeared that he was injured by the car in which he was riding running off the track. The defendant asked the court to charge that the presumption of negligence arising from an accident to the car resulting in injury to the passenger, was successfully rebutted by proof that the track was in good order and repair, the car in perfect repair, and the management and operation careful and skillful. The court, while neither denying or affirming defendant's point, charged the jury that the question as to whether the presumption of negligence had been successfully rebutted or not was for them to determine. It was held that the charge was proper.¹⁰

Where a person ran out to the middle of a car track and warned the motorman that the wall of a building in course of demolition is about to fall against a pile of bricks close to the track ahead of his car, and the evidence shows that he must have seen and heard the signals to stop and that the warning was given him in time to enable him to stop his car, but that he went on until his car was alongside the pile of bricks, when the wall of the house falling against some of the bricks forced some of them into the car, injuring a passenger, the railway company is liable to the passenger for the injury sustained.¹¹

A street railway company operated two lines of electric passenger cars, running one line north and the other south; the terminus of the line running north was at the corner of Penn and Lackawanna avenues; of that running south in front of the Wyoming House, a block distant; the company provided a continuous passage on both lines by transfer tickets. Plaintiff got upon a car of the north line to go to Mountain Lake, a

⁹ *Kehoe v. Allentown & Lehigh Valley Traction Co.*, 187 Pa. 474 (1898); 29 Pitts. 197 (1898.)

¹⁰ *O'Connor v. Scranton Trac. Co.*, 180 Pa. 444 (1897.)

¹¹ *Buehler v. Union Traction Co.*, 200 Pa. 177 (1901.)

resort on the south line. She paid her fare and when the car reached the terminus of its line she was given a transfer which read: "Good upon the next south side car within thirty minutes from nine o'clock." She then walked to the starting point of the south side car in front of the Wyoming House, a block distant. While standing on the pavement the trolley car pulled up and stopped, and as it would proceed to its destination in an opposite direction, it was necessary to turn the trolley pole from one end of the car to the other and while being transferred by the motorman it broke and a piece of it struck the plaintiff on the head and shoulder, inflicting a severe injury. At the time she was struck she had moved from the pavement to a point midway between the curb and the car; the distance from car to curb was about ten feet; and at the time the seats had been reversed, two or three passengers being already in the car. A verdict by direction of the court was entered for plaintiff, which upon appeal was affirmed. Dean, J., said: "The case turns on whether the court below was correct in holding on the undisputed facts that plaintiff at the time she received the injury was a passenger. It must be conceded that the transfer ticket on its face was an undertaking to carry her from the point where the car started in front of the Wyoming House to her destination on the south side line. Clearly the duty to the passenger under such circumstances does not end the moment the passenger's foot touches the street. And so with the next starting car: She had traversed the sidewalk and is on the pavement in front of the Wyoming House; the car moves up to the end of the line in front of her and stops; she steps outside the curb and moves towards it; the seats are being reversed, two or three passengers are already in the car; when within four or five feet of it she is struck by the broken pole, which is of necessity being changed. She is not a traveller on the highway, is not a resident who desires to cross the street; is not a mere spectator who from curiosity or idleness stands in that situation with reference to the car, she is there because under the stipulations of the contract then in her possession she has a right to take passage in that particular car at that point. In no sense is she one of the general public. If it were not for her contract she would not be there at all. Under such circumstances the carrier's duty to her was what it

owed to a passenger, as much so as if her injury had been caused by a rotten step on the car."¹²

Biding on Platform.

234. A rule of a street railway company forbidding passengers to stand on the platform when there is room inside the car, is a reasonable regulation of a common carrier. The necessity for the enforcement of such a rule is to be determined by the conductor of the car and not by the company.

If a passenger refuses to go into the car where there is room, and he gives to the conductor no adequate reason for his refusal, and he is put off the car, and is injured in attempting to get on again, he cannot recover damages from the railway company.¹³

When passengers are invited or permitted to ride on the rear platform of an electric car, it is the duty of the company to observe a high degree of care in the running of the car at a point where there is danger that the passenger may be thrown off, and the passenger is also required to observe a high degree of care, since he has voluntarily assumed a dangerous position.¹⁴

Plaintiff got on an electric car at night, and as there was no room inside the car, he stood on the rear platform. His first position was between the controller and the brake, with his back to the railing of the platform. Here he was compara-

¹² *Keator v. Scranton Traction Co.*, 191 Pa. 102 (1899.)

¹³ *McMillan v. Federal St. & Pleasant Valley Pass. Ry.*, 172 Pa. 523 (1896); 26 Pitts. 303 (1896.)

¹⁴ *Reber v. Pittsburgh & Birmingham Traction Co.*, 179 Pa. 339 (1897.)

"When a street railway company permits its cars to be overcrowded additional care and precaution must be exercised by the conductor and motorman to protect the passengers against resultant danger. A street railway company cannot invite or permit passengers to board its cars beyond their normal capacity and not be responsible for danger which necessarily results from their overcrowded condition. If a passenger is permitted to enter a car having no vacant place except on the platforms and the conductor accepts his fare, he is justified in standing on the platform if he exercises proper care in doing so; and by receiving him the carrier undertakes and gives him assurances that he will take care of him and protect him against accident as far as the circumstances permit." Per Mestrezat, J., in *McCaw v. Union Trac. Co.*, 205 Pa. 271 (1903.)

tively safe. Subsequently at the request of the conductor he tried to enter the car, but being unable to do so, he took a position, at the request of the conductor, at the outer edge of the platform near the step, standing with his back to the car, holding with his right hand the iron railing behind him. While he was standing in this position the electric current was turned off and the car was permitted to run down a grade at a rate of fifteen or twenty miles an hour. At the foot of the grade there was a curve, and when the car struck the curve plaintiff's grasp was loosened and he was thrown off the car and injured. It appeared that plaintiff was familiar with the locality, and knew of the curve. It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained.¹⁵

Plaintiff, a passenger on one of defendant's cars, surrendered his seat to a lady and stood in the aisle near the front door until the car became so crowded, that at the conductor's request he went out on the front platform and stood on the extreme end of one side of it, supporting himself by holding the brass bar under the window, and while in this position, and while the car was being run very rapidly over some railroad tracks, the conductor who had preceded the car at the crossing, jumped on the front steps on the side opposite the plaintiff and in doing so pushed other passengers who were on the platform against the plaintiff, causing him to lose his hold on the bar and fall under the wheels of the car. It was held by the court that the case was for the jury, and on appeal a verdict for plaintiff was sustained.¹⁶

Plaintiff, a man of fifty-six years, was a passenger on a car of defendant company. Instead of going inside the car, where there were vacant seats, he stood outside on the back platform, and while holding to a metal rod which protected the back window, a collision occurred in which plaintiff was injured. It was held that plaintiff could not recover. Mitchell, J., said: "The proper and assigned place for passengers is inside the car. Unless he shows some valid reason to excuse him, a passenger is bound to put himself in the appointed place, and if he

15 *Reber v. Pittsburg & Birmingham Traction Co.*, 179 Pa. 339 (1897.)

16 *McCaw v. Union Trac. Co.*, 205 Pa. 271 (1903.)

does not, he takes the risk of his location elsewhere. This is the settled rule of all our cases. It is the long settled rule that standing on the platform of a moving railroad train is negligence per se, and on the other hand our cases have practically established that standing on the platform of an ordinary horse car is not negligence per se, but raises a question for the jury. In respect to this subject the electric trolley car occupies a position between these two. As said by our Brother Fell in *Reber v. Pittsburg, etc., Traction Co.*, 179 Pa. 339, 'the use of electricity as a motive power by passenger railway companies has created new conditions from which new duties arise. The greater speed at which cars are moved increases the danger to passengers and to persons on the streets, and of these dangers all persons must take notice.' The principle at the foundation of the rule is and always has been the same, but in the development of travel the circumstances and conditions have changed. Rapidity of transit is no longer a mere convenience to the traveler, it has become a matter of vital interest to the general business of the community. The increased speed upon passenger railway lines, with its resultant danger, now approximates to that of steam railroads, and indeed, in many cases, exceeds the speed of the fastest trains at a time not too remote to be within the memory of every judge on this bench, a time at which the rule as to steam cars was first established. The reasons which were potent in the establishment of that rule then are equally potent in its application now. We hold, therefore, that where there is room to be seated inside in the passenger's proper place, and no special and sufficient reason is shown why he should not avail himself of it, it is negligence per se to remain on the platform of a moving trolley car."¹⁷

When a street railway car and platform are full to overflowing so that there is no longer standing room in the car or on the platform, standing on a bumper outside of the platform is such contributory negligence as will prevent a passenger, who is injured while in this position by a rear end collision

¹⁷ *Thane v. Scranton Traction Co.*, 191 Pa. 249 (1899); affirming 8 Super. Ct. 446 (1898); *Bumbear v. United Traction Co.* 108 Pa. 198 (1901.)

with another car, from recovering damages from the railway company.¹⁸

Where a person who is the only passenger on a horse car, takes his seat upon the driver's high stool on the front platform without any invitation upon the part of the driver, and is thrown from the stool while the car is turning a curve, his wife cannot recover from the railway company damages for his death.¹⁹

Riding on Side Steps of Summer Car.

235. The side steps of an open summer car are not intended for the use of passengers, except as a means of ingress and egress. A passenger who rides on a side step when it is reasonably practicable for him to go inside the car, assumes all the risks of his position, and in all cases he assumes the risk incident to the usual swaying and jolting of the car and from collisions with passing vehicles, and with obstructions of whatever nature which unexpectedly appear. These are dangers which cannot be guarded against by the careful and prudent management of the car. But when the passenger by invitation of the conductor or with his knowledge and assent and from necessity, because of the want of sitting or standing room inside the car rides on the side step he is entitled to the same degree of diligence to protect him from dangers which are known and may readily be guarded against as other passengers.²⁰

Plaintiff got upon the side step of an open summer car to ride to his work at a place where he had taken the cars every morning for several weeks before. The car as usual was full and there was not standing room inside or on the platform. He stood as usual on the side step, which was filled with passengers. The conductor received his fare and made no objection to his standing on the step. At a place where the street curved the railway tracks were so near one side as barely to leave room for a wagon to stand between them and the

¹⁸ *Bard v. Pennsylvania Trac. Co.*, 176 Pa. 97 (1896); 13 *Lanc.* 281 (1896.)

¹⁹ *Mann v. Philadelphia Traction Co.*, 175 Pa. 122 (1896.)

²⁰ *Bumbear v. United Traction Co.*, 198 Pa. 198 (1901), per *Fell, J.*; *Woodroffe v. Roxborough, Chestnut Hill & Norristown Ry.*, 201 Pa. 521 (1902.)

walls of a hotel building. At this place each morning during the summer ice wagons stood while ice was delivered at the hotel. On the morning of the accident the hub of a wheel of an ice wagon was so near to the tracks as to project over the side step of the car. The motorman could have seen the position of the wagon when a square from it, and he was signaled by the man in charge of the wagon to stop. He went on without slackening the speed of the car and the plaintiff was injured by the hub of the wheel striking him. There was an offer by the plaintiff which was rejected, to prove that every morning during the summer the men in charge of the wagons gave notice to the men in charge of the defendant's cars as they approached the place, in order that time should be given to draw the wagons out and let the cars pass in safety. It was held that the case was for the jury.²¹

A street railway company is not liable for the death of a passenger on an open electric car where it appears that the deceased while riding on the side steps of the car was killed by contact with a pole which supported the electric wire, that the conduct of the deceased was disorderly and reckless; that he disregarded repeated warnings of his danger; that when injured he was holding the upright hand-rail with his arms extended and his body and head thrown back from the car, and that there was standing room within the car.²²

A person who goes upon the track to mount the running board of an open summer car before the bar preventing passengers from entering on that side is raised and is injured by a car on the other track cannot recover.²³

Plaintiff was injured by falling from an open summer car of defendant company. Witnesses for the plaintiff testified that they saw her fall from the car, but neither the plaintiff nor any of her witnesses gave any explanation as to how or why the accident occurred. The uncontradicted testimony of witnesses for the defendant was to the effect that at the time of

²¹ *Bumbear v. United Traction Co.*, 198 Pa. 198 (1901.)

²² *Woodroffe v. Roxborough, Chestnut Hill & Norristown Ry.*, 201 Pa. 521 (1902.)

²³ *Malpass v. Hestonville, Mantua & Fairmount Pass. Ry.*, 189 Pa. 599 (1899.)

the accident plaintiff, although warned to keep her seat, was standing at the end of the seat in an open summer car whose seats ran lengthwise across the car. It was held that binding instructions should have been given for defendant.²⁴

Injury at Open Window.

236. A passenger while sitting at an open window in a street car had his arm broken by a collision between the car in which he was riding, and a car of another company. The evidence was conflicting as to whether he had his arm out the window or not. The action was against the two companies. The evidence did not disclose any agreement or arrangement between the companies as to the right of way at the crossing. Each company introduced evidence which tended to establish the fault upon the other. It was held that the case was for the jury, and that a verdict and judgment for plaintiff against both companies should be sustained.²⁵

Getting on Car.

237. Where a car stops at a crossing to receive passengers, it is the duty of the conductor of the car to see that these persons have a reasonable time in which to enter in safety, or if the car is so crowded with passengers as to make it unsafe to receive them, to give them notice to stay off the car. If the conductor of the car relying on the information of a passenger on the back platform, starts the car while persons desiring to alight are endeavoring to do so, the question of negligence is for the jury. The conductor may not delegate his judgment to the passenger, as to when a car should start.²⁶

If a street car has stopped, or is in the act of stopping or is in such a condition of running or stopping as induces an intending passenger to think that it is about to stop, the passenger has a right to get on, and if the car starts before he is safely seated in the car and an injury results, the company is liable. The fact that a passenger in such a case had a concealed infirmity in an injured knee is not sufficient to justify the court

24 *Jackson v. Philadelphia Traction Co.*, 182 Pa. 104 (1897.)

25 *Goorin v. Allegheny Traction Co., et al.*, 179 Pa. 327 (1897.)

26 *McCurdy v. United Traction Co.*, 15 Super. Ct. 29 (1900.)

in pronouncing the passenger guilty of contributory negligence.²⁷

Plaintiff, a woman, approached an open summer car of a street railway company from the side on which there was a second track and from behind a car passing on that track. Believing that the car stopped in answer to her signal she mounted the step and was injured by the starting of the car as soon as she stepped up on the step. It was held that the case was for the jury.²⁸

Plaintiff was injured while attempting to get on a street car of defendant company. She testified that she signaled the car to stop at a regular street crossing, and while the car was standing still she started to mount the rear platform of the trailer car. When she had grasped the hand-rails and had placed her right foot on the lower step and was in the act of drawing her body up, so as to place her left foot on the step, the car started forward and she was thrown to the ground.

It was held that the case was for the jury.²⁹

Where plaintiff testified that while the car was going slowly and before it had stopped, he had one foot on the street and one on the step, and as he was about raising his foot from the street he was thrown from the car and injured, it is not error to direct a verdict for defendant.³⁰

Where a person is injured while getting on a street car the case is for the jury where the evidence is conflicting as to whether the car was in motion when the plaintiff attempted to get on. In such a case it is not improper for the court to charge that if the car had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced plaintiff to think it was about to stop, then he had a right to get on, and if the car started before he was safely seated, and an injury resulted therefrom the verdict should be for the plaintiff.³¹

No recovery will be permitted where plaintiff signaled a

27 *Austrian v. United Traction Co.*, 19 Super. Ct. 329 (1902.)

28 *Austrian v. United Traction Co.*, 19 Super. Ct. 329 (1902.)

29 *Shuart v. Consolidated Traction Co.*, 15 Super. Ct. 26 (1900.)

30 *Lawrence v. Union Trac. Co.*, 12 Dist. 301 (1903.)

31 *Walters v. Phila. Trac. Co.*, 161 Pa. 36 (1894.)

car to stop, and the motorman slackened speed preparatory to stopping, but without waiting for it to stop and while running at the rate of three or four miles an hour, he attempted to get on, and just as he put one of his feet on the lower step and his right hand had grasped the hand-rail, he was thrown by the accelerated speed of the car to the street and dragged about the length of "two pavements."³²

The case is for the jury where the evidence, although contradicted, tended to show that plaintiff, a man fifty-eight years of age, boarded a summer car; that when he saw the car coming about 100 feet distant, he waved his hand to the motorman to stop, who at once put on the brake, so that when it reached the plaintiff it had almost stopped, and he stepped up on the running board and was about to go into the body of the car when the conductor rang the bell for the car to start; that it was instantly started with a jerk, which threw him off and crushed his leg.³³

In an action to recover damages for the death of plaintiff's wife, the evidence tended to show that the deceased was injured by the sudden starting of the car as she was in the act of getting on the rear platform. The evidence also showed that the deceased felt at once the physical effect of her injuries, followed the next day by symptoms of premature childbirth, which occurred a few days later and was followed by tetanus, which caused her death. The medical testimony agreed that while tetanus resulting from childbirth is comparatively rare, there is a distinct relation between it and childbirth, especially miscarriage, and that it is one of the natural and probable consequences to be apprehended. It was held that the question whether the injuries caused by the sudden starting of the car were the proximate cause of her death was for the jury.³⁴

Where plaintiff was injured in attempting to board an open summer car by stepping into an uncovered manhole, there can be no recovery.³⁵

32 *Hunterson v. Union Trac. Co.*, 205 Pa. 568 (1903.)

33 *Powelson v. United Trac. Co.*, 204 Pa. 474 (1903.)

34 *Brashear v. Philadelphia Traction Co.*, 180 Pa. 392 (1897.)

35 *Sellers v. Union Trac. Co.*, 21 Super. Ct. 5 (1902.)

Alighting from Car—Contributory Negligence.

238. A passenger is guilty of contributory negligence if he attempts to alight from a car while it is in motion.³⁶

It is the duty of a street railway company to stop its cars at suitable places for passengers to leave them, and to keep them stationary long enough to enable passengers to alight from them in safety.³⁷

A passenger who steps off a moving car and does not wait until it has come to a stop is guilty of contributory negligence, but if a car is about to stop and a passenger believing that it is actually stopping, steps off while it has a slight motion and the car is suddenly jerked forward, causing him to fall, the case is for the jury to determine whether the passenger is guilty of contributory negligence.³⁸

The attempt of a passenger to leap from an electric car moving at the rate of from four to five miles an hour, is contributory negligence. Plaintiff in going to his home from his business used the defendant's line of cars. To shorten his walk he was in the habit of leaping from the cars at a point where they did not ordinarily stop. It appeared that the conductor and motorman knew of this habit, and at a signal from the plaintiff would slacken the speed down to about four or five miles an hour. Plaintiff was injured while jumping from the car after it had thus slowed down. It was held that a non-suit was properly entered.³⁹

If a passenger on a street car, after signaling the conductor to stop the car and before it reaches its stopping place, and while it is still in motion, gets down on the running board and from there is thrown to the pavement by the stoppage of the car "with a sudden, violent jerk," he is guilty of contributory negligence. In such a case the passenger by his action, assumed the risk of being jolted off.⁴⁰

Where a passenger, after his signal to stop at a crossing had

36 *Neff v. Harrisburg Traction Co.*, 192 Pa. 501 (1899.)

37 *Jagger v. Peoples Str. Ry.*, 180 Pa. 436 (1897.)

38 *Heffron v. Scranton Ry. Co.*, 4 Lacka. Jur. 307 (1903.)

39 *Jagger v. Peoples Str. Ry.*, 180 Pa. 436 (1897.)

40 *Bainbridge v. Union Trac. Co.*, 11 Dist. 697 (1902); 27 Pa. C. C. R., 414 (1902.)

been ignored, arose and stood at the extreme end of the car with his face to the rear, and his arm around a stanchion, and again signaled the conductor, whereupon the car was suddenly stopped with a jar, in the middle of the block, and the passenger was thrown out and injured, there can be no recovery. Potter, J., said: "Can the motorman be said to be guilty of negligence for bringing his car quickly to a stop in response to the demand of the appellee because his doing so disturbed the balance of a passenger who was standing with his back to the front of the car and upon the extreme edge? Unless it is the duty of a street railway company to stop its cars in such a manner that persons standing up and riding backwards shall not be jolted off their equilibrium there is no negligence shown in this case. It is common knowledge that the momentum of a heavy moving car cannot be quickly overcome, as the appellee required should be done in this case, without producing something of a jolt. It is for the purpose, among others, of guarding passengers against danger from this cause that the notices are posted requesting passengers to keep their seats until the car stops."⁴¹

Plaintiff, a passenger on the suburban trolley line of the defendant, desired to get off opposite her residence. She was familiar with the route and the place where she desired the car to stop. The tracks of the defendant were laid on a public road close to the left side of which was a drainage ditch or gutter which, near the place where the accident occurred, was spanned by a bridge that was used as an entrance to her residence. On the opposite side of the trolley track was a level roadway. Plaintiff signaled the conductor to stop, thinking she was opposite the bridge, and in alighting from the left side of the track fell into the ditch and sustained injuries. It appeared that the accident happened at night; that there was an electric light burning directly over the platform from which plaintiff stepped, and a gas lamp burning about twelve or fifteen feet distant.

It was held that a verdict was properly directed for the defendant.⁴²

⁴¹ *Jennings v. Union Trac. Co.*, 206 Pa. 31 (1903.)

⁴² *Bland v. Roxborough, Chestnut Hill & Norristown Ry. Co.*, 13 Super. Ct. 93 (1900.)

Where a passenger notifies a conductor to stop at a particular street, and subsequently when the car has reached the street and is passing it and the conductor is on the front platform talking to the motorman, the passenger tries to catch the conductor's attention but failing to do so, attempts to alight from the car while it is moving and is injured, the passenger cannot recover from the railway company for the injuries sustained.⁴³

Where a passenger on the back platform of a street railway car tells the conductor to stop at an approaching street, but the conductor fails to ring the bell to stop and the motorman receiving no signal keeps on, although slackening speed in crossing the street, and then puts on more power after crossing, and the passenger gets down on the lower step, and by reason of the motion of the car caused by the increasing speed, falls off, he cannot recover damages for his injuries from the company, as the proximate cause of the injury was the act of the passenger in assuming a dangerous position before the car stopped.⁴⁴

If the plaintiff's evidence that he was thrown from the lower step of a car by a sudden jerk forward of the car is contradicted by a previously signed statement by himself that he jumped off the car while it was in motion, which statement is corroborated by the testimony of three of defendant's witnesses and by one of his own witnesses on cross examination, a verdict and judgment for defendant will not be reversed.⁴⁵

Plaintiff was injured while a passenger on one of defendant's cars. He requested the conductor to stop at an approaching street, and while attempting, with articles in both hands, to push through two men on the lower step, the conductor started the car, leaving the plaintiff standing with one foot on the lower step and one on the platform. While standing in this position, crowded between the two men, he fell from the car as it crossed over another street over a railroad track. It was held that as he fell from the car while it was passing in its ordinary motion there was no negligence on the part of defendant, and a non-suit was properly entered.⁴⁶

⁴³ *Foran v. Union Trac. Co.*, 22 Super. Ct. 10 (1903.)

⁴⁴ *Shade v. Union Traction Co.*, 20 Pa. C. C. R. 292 (1898); 7 Dist. 34 (1898.)

⁴⁵ *Foster v. Union Traction Co.*, 199 Pa. 498 (1901.)

⁴⁶ *Barry v. Union Trac. Co.*, 194 Pa. 576 (1900.)

Where a passenger on an open summer car steps down on the running board as the car approaches a crossing, holding on the rail with one hand, and is thrown off by the sudden stopping of the car, there can be no recovery.⁴⁷

Plaintiff was injured while stepping off a stationary car. He testified that his heel caught in the step and he was thrown. There was no evidence that there was anything the matter with the step nor any injury to the step as a portion of the means of transportation. It was held proper to enter a nonsuit.⁴⁸

A woman while riding on an open summer car, with a running board along its side, told the conductor that she wanted to get off at a certain street. Whether or not he heard her, was not shown, but he saw her signal and shortly afterwards stopped the car. This was at a point some distance from the street where plaintiff desired to alight. When the car stopped she stood up and looked at the conductor, and he looked at her. Neither of them spoke, but plaintiff stated that she thought she ought to get off, because the conductor seemed to be waiting for her to do so. Although she knew that the car had not yet reached the street at which she desired to alight, she stepped down on the running board and attempted to step off backwards from there to the ground. The track was laid at that point near the side of the road which sloped considerably towards the gutter. She found the distance too great for her to touch the ground comfortably with her foot, immediately under the running board, and whether from confusion, or inability to control herself, the result was that she fell. Whether or not she could have safely alighted by stepping across the gutter to the footwalk did not appear. She testified that she did not look right down at the ground as she stepped off. She said, "I looked over and saw the path, and I thought it was all right." The accident happened in the early afternoon of a summer day. The car stood perfectly still while plaintiff was alighting, and when she fell, the conductor who was on the rear platform at once stepped down and helped her up. There was no dispute

⁴⁷ *Bainbridge v. Union Trac. Co.*, 206 Pa. 71 (1903.)

⁴⁸ *Howell v. Union Traction Co.*, 202 Pa. 338 (1902.)

about the facts. Held, that the case was for the court, and that it was error to submit the case to the jury.⁴⁹

Alighting from Car—Cases for Jury.

239. A passenger who has a well founded fear that a collision is about to occur is justified in leaping from the car and the presumption of the carrier's negligence is not confined to the case of injuries resulting from actual collision, but extends to those caused by an effort to escape it.⁵⁰

It is the duty of persons in charge of a railway car to give persons laden with bundles a reasonable opportunity to alight, and whether this was done is a question for the jury.⁵¹

Plaintiff was a passenger on a street car of defendant company. The car stopped thirty feet or more from a railroad track, while the conductor left the car and went forward to the railroad to look out for approaching trains. It was admitted that the place where the car stopped was a customary place for passengers to alight. The conductor having found the way clear signaled the motorman to start the car, and the plaintiff while in the act of stepping from the car, was thrown to the ground and injured. It was held that it was proper to leave both the question of defendant's negligence and plaintiff's contributory negligence to the jury.⁵²

Where the evidence is conflicting as to whether a passenger left the car while in motion, it is error for the court to charge that if the jury believe the evidence of the railway company they might find for the company; and if in such a case there is no evidence to show that the car was going so slow as to be substantially stopped when the accident occurred, it is error to introduce that element into instructions given to the jury.⁵³

Where a boy, eight years old, was injured in alighting from a car, the case is for the jury where the evidence shows that he was prevented from alighting by the fact that the car did not stop long enough for him to do so, and the evidence was also conflicting as to whether he was jolted from the car, fell off or jumped off.⁵⁴

49 *Scanlon v. Rapid Transit Co.*, 208 Pa. 195 (1904.)

50 *Palmer v. Warren Str. Ry.*, 206 Pa. 574 (1903.)

51 *Machen v. Pittsburg & West End Pass. Ry.*, 13 Super. Ct. 642 (1900.)

52 *Bensing v. Peoples Electric St. Ry. Co.*, 9 Super. Ct. 142 (1898.)

53 *Neff v. Harrisburg Trac. Co.*, 192 Pa. 501 (1899.)

54 *Moran v. Versailles Trac. Co.*, 188 Pa. 557 (1898.)

Plaintiff was injured while attempting to alight from the back platform of a street car. He testified that he notified the conductor to stop about the middle of the square; that the conductor pulled the bell, and the car slowed up; that plaintiff stepped down on the lower step; and that just as the plaintiff was about to step to the ground there was a sudden jerk, caused by the increased speed of the car, and plaintiff was thrown off and injured.

It was held that the question of plaintiff's contributory negligence and defendant's negligence was for the jury.⁵⁵

Where a passenger on a summer car testifies that when the car stopped at a point where he was to be transferred to another line, he gathered up some tools and started to leave the car, and when he reached the foot-board and was about to step off, the car gave a jerk or jolt, and he was thrown off and injured, the case is for the jury, and a verdict and judgment for plaintiff will be sustained.⁵⁶

The conductor of a street railway car caused his car to come to a stop and after the plaintiff had alighted and was upon the sidewalk got off and handed the plaintiff his box of tools, and then gave the signal for the car to proceed. The car was rounding a curve, and while going around, the part of the car which extended a few inches over the curb upon the sidewalk, struck the plaintiff, who was stooping, from behind and caused him to fall forward. It was held that the case was for the jury.⁵⁷

A woman passenger after alighting from the front platform of a car and taking a few steps fell and was injured. At the place where the accident occurred the defendant company was reconstructing its tracks with a view of changing the mode of operating its car from a cable line to an electric line. The plaintiff on reaching this point was requested by the motor-man, who opened the front door of the car, to leave the car from the front platform, in order to be transferred to another car, which stood upon the track some distance ahead. She testified that she followed his direction and descended to the

55 *Mitchell v. Electric Traction Co.*, 12 Super. Ct. 472 (1900.)

56 *Smith v. Easton Transit Co.*, 167 Pa. 209 (1895.)

57 *Twaddell v. Chester Trac. Co.*, 6 Del. 399 (1896.)

ground from the steps of the front platform; that the ground was broken and the night dark and that within a very few steps she caught her foot in some way and fell to the ground and was injured. It was held that the case was for the jury.⁵⁸

Plaintiff was injured in attempting to alight from an open summer car with transverse seats. It appeared from the plaintiff's testimony that when he was about one hundred feet from the crossing where he wished to get off, he arose, turned toward the back platform, raised his hand as a signal and called to the conductor to stop at the next street. The conductor pulled the bell and as the speed slackened while the car was crossing the street, the plaintiff stepped to the side and stood with one foot on the car and the other on the running board. When he observed that the car was not stopping on the north side of the street he withdrew his foot from the running board to the body of the car and again signaled the conductor to stop. The conductor then again pulled the bell and the speed was slackened until the car came almost to a stop, and it was then suddenly accelerated, giving the car a jerk which threw the plaintiff, who was standing on the body of the car, and holding firmly to the vertical hand-rail, to the street. It was held that the case was for the jury.⁵⁹

Plaintiff was a passenger on one of defendant's cars which lost its power of traction. Visick, who was employed by the defendant's at their car barn as a blacksmith and shifter of cars, went to the assistance of the motorman, and after assisting him, went on foot to the car barn, got out an empty car and went to the relief of the stalled car. In descending the grade towards the car, Visick lost control of the car, and a collision ensued in which plaintiff was injured. Defendant contended that the plaintiff contributed to her injury by her negligence in jumping from the car.

The court held that where a passenger in a moment of sudden peril jumps from a car and is injured, the act of jumping attended under such circumstances, although possibly not the part of wisdom, is not to be judged by the same standard as acts done where no sudden danger threatens, and it was not

⁵⁸ *Sowash v. Consolidated Traction Co.*, 188 Pa. 618 (1898.)

⁵⁹ *Sweeney v. Union Traction Co.*, 199 Pa. 293 (1901.)

error for the court to refuse to hold that the plaintiff cannot hold the defendant company liable, as the question of the company's liability for the accident was for the jury.⁶⁰

Evidence.

240. The fact that a street railway company ran two cars toward each other on the same track is not evidence of negligence.⁶¹

Plaintiff's head was slightly bruised and his eye blacked while riding as a passenger on one of defendant's cars. He walked home complaining of feeling tired and felt worse the next day; the next day after he was feverish with pain in his head; and to these complications on the next and succeeding day were added restlessness, swelling in the throat and wandering of the mind. Plaintiff died on the sixth day after the accident. At the time of the accident plaintiff was suffering from blood poisoning, complicated with Bright's disease. The court directed a verdict for defendant, as the evidence did not show that plaintiff's death was necessarily the result of the accident.⁶²

If a motorman of an electric car, after an explosion of the controller, when he is in no danger, abandons his post on the front platform of a crowded summer car, and jumps over the back of the front seat among the passengers, causing an injury to one of the passengers who was injured in the panic which followed, it is for the jury to determine whether the act was not negligent, and such as to reasonably cause the passengers to believe they were in imminent danger.⁶³

It is the duty of a street car driver to look out for obstructions, whether persons or vehicles, on the track. He may, however, in the performance of this duty ascertain from the person on the side of the street by looking at him, whether he desires to take passage; and in doing this he may for an instant turn his face to the sidewalk, and it does not necessarily follow from this that he is guilty of negligence.⁶⁴

60 *Quinn v. Shamokin & Mount Carmel Elec. Ry.*, 7 Super. Ct. 19 (1898.)

61 *Palmer v. Warren Str. Ry.*, 206 Pa. 574 (1903.)

62 *Bruns v. Union Traction Co.*, 185 Pa. 533 (1898.)

63 *Dunlay v. United Traction Company*, 18 Super. Ct. 206 (1901.)

64 *Johnson v. Reading City Pass. Ry.*, 160 Pa. 647 (1894.)

CHAPTER XXXVII.

NEGLIGENCE—STREET RAILWAYS—INJURIES TO CHILDREN.

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| 241. Speed. | 245. Accidents at Stations. |
| 242. Duty of Motormen. | 246. Contributory Negligence of
Parents. |
| 243. Darting in Front of Cars. | 247. Evidence. |
| 244. Accidents on Cars. | |

Speed.

241. A boy, five years old, was killed by a street car. Three witnesses testified that the car which killed the child was running at a high rate of speed, that their attention was particularly attracted to it by the unusual speed, and that the car ran thirty-five feet beyond the crossing where the child was killed before it could be stopped. It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be affirmed.¹

Where a child, six years and six months old, was run over by one of defendant's street cars, and the testimony showed that the car was running at the rate of twenty-five miles an hour through a populous part of a borough, near a school house at a time when school children were on the street, and that no notice by gong was given of its approach to the crossing where the accident happened, the case is for the jury.²

A boy, twelve years old, jumped across a ditch which was about two and one-half feet from defendant's street railway track, and stood in the intervening space. A car approached at an unusually high rate of speed, without any bell being rung, (although this was contradicted by defendant's witnesses) and struck the boy. The evidence for the defendant tended to show that the boy ran parallel with the car for a short distance on the pavement, then jumped the ditch and ran in front of

¹ *Dunseath v. Pittsburgh, Allegheny & Manchester Traction Co.*, 161 Pa. 124 (1894.)

² *Hoon v. Beaver Valley Trac. Co.*, 204 Pa. 369 (1903.)

the car, and was immediately run over. It was held that the case was for the jury.³

In a case where a child of tender years is injured by the negligence of a motorman, the question of defendant company's negligence is for the jury, when the evidence tends to show that the car was running at the rate of from fifteen to eighteen miles an hour, and that after the child was discovered the car ran up an up-grade from eighty-five to one hundred and fifty feet.⁴

Where the evidence for plaintiff, although contradicted, tends to show that a child, six years old, was struck by a car running at an unusually high rate of speed; that no signal was given as it approached the crossing where the child was struck, and that the car did not stop on either side of the cross street, the case is for the jury.⁵

Plaintiff, a lad six years and four months old, was killed by a car while playing in the street in attempting to run around the car while running the same way with the car, with some other children. Plaintiff alleged the undue speed of the car as the cause of the accident, and one of the witnesses testified that "the car was going awful fast," another that "it seemed to me she was running quite lively," another, "I noticed the motorman stopping the car as quick as he could;" and the same witness who was uncontradicted, testified that the car "was stopped in half its length." There was no evidence of want of care on the part of the motorman, either before or after the child was seen by him. The court reversed a verdict for the plaintiff of six and one-quarter cents, holding that the defendant was entitled to a compulsory non-suit.⁶

An infant of five years was run over by a car of defendant company, while attempting to cross defendant's tracks. The evidence as to the rate of speed at which the car was traveling and as to whether the infant was standing on the street corner

³ *Iaquinta v. Citizens Traction Co.*, 166 Pa. 63 (1895); 25 Pitts. 467 (1895.)

⁴ *Hooper v. United Traction Co.*, 17 Super. Ct. 638 (1901.)

⁵ *Maher v. Philadelphia Trac. Co.*, 181 Pa. 391 (1897.)

⁶ *Cominskey v. Connellsville, New Haven & Leisenring Str. Ry.*, 4 Super. Ct. 631 (1897.)

or on the intersecting street was conflicting. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.⁷

A little girl, almost four years old, while playing in the street, was run over by an electric car and killed. When last seen before the accident she was jumping rope and running across the street from one side to the other, at some distance from a crossing. The car stopped almost immediately after the child was struck. Plaintiff claimed that the accident was due to the undue speed of the car, but the only evidence as to this was found in vague declarations of witnesses, who admittedly gave no attention to the car as it approached them, and who described the car as "coming at pretty full rate," "going unusually fast," and "almost as fast as it could." There was no evidence of want of care on the part of the motorman, either before or after the child was seen by him. It was held not to be error to enter a non-suit.⁸

Duty of Motorman.

242. If a motorman allows his attention to be distracted to the side of the street to a crowd of people who are shouting, and runs over a child which he would have seen in time to prevent the accident if he had been looking in the proper direction, the company may be held liable.⁹

If a motorman is not looking ahead and pays no attention to calls from persons on a sidewalk, and runs over a child four years old, which he could have seen in time to save if he had been looking in the proper direction, the company may be held liable.¹⁰

If a motorman looks towards a house on the side of the street, and fails to see a boy three years old, in the cartway ahead of him, moving towards the track, whom he would have seen if he had looked ahead, and whom passengers in the car saw, and if it appears that he could have stopped the car in time to prevent injury to the child had he been looking in the

7 *Beard v. Reading City Passenger Ry. Co.*, 3 Super. Ct. 171 (1896.)

8 *Moss v. Philadelphia Traction Co.*, 180 Pa. 389 (1897.)

9 *Reilley v. Philadelphia Traction Co.*, 176 Pa. 335 (1896.)

10 *Evers v. Philadelphia Traction Co.*, 176 Pa. 376 (1896.)

proper direction, the railway company is liable in damages to the child and its parents.¹¹

Where a child, nearly seven years old, was knocked down and injured by a trolley car, and the motorman testified that he saw children in the road only a few feet from the track when he was "fifty or sixty yards away or maybe more than that," and that he knew a school house was there, it was held that these circumstances imposed upon him the duty of at once getting his car under control, and whether he did all that was reasonably proper for that purpose was a question for the jury.¹²

Where there is evidence that a motorman failed to ring the bell and to perceive the approach of a child of tender years, and that he was engaged in conversation with one of the passengers just before the accident and had his face turned away from the track, the case is for the jury.¹³

The measure of a child's responsibility for contributory negligence is his capacity to understand and avoid danger.¹⁴

Where a boy, ten years old, was run over by one of de-

11 *Harkins v. Pittsburgh, Allegheny & Manchester Traction Co.*, 173 Pa. 146 and 149 (1896); 26 Pitts. 375 and 427 (1896.)

12 *Oster v. Schuylkill Traction Co.*, 195 Pa. 320 (1900.)

13 *Karahuta v. Schuylkill Trac. Co.*, 6 Super. Ct. 319 (1898.)

14 In *Parker v. Washington Electric Street Railway*, 207 Pa. 438 (1904), Fell, J., said: "In analogy to the common-law rule of responsibility for crimes committed, a child under seven years of age has been conclusively presumed to be incapable of appreciating and guarding against danger; and after seven the presumption of incapacity, although not irrebutable, and growing less strong with each year, continues until fourteen, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption. The standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held in the absence of evidence on the subject: *Kehler v. Schwenk*, 144 Pa. 348. It follows, that as responsibility depends upon the knowledge and experience of the child and on the character of the danger to which he is exposed, generally the question is one for the jury and not for the court. This must always be so when the facts are in dispute or the inferences to be drawn from them are doubtful. But in clear cases, where the facts are settled and there can be no reasonable doubt as to the inferences to be drawn, the question may be determined by the court as matter of law."

fendant's cars, the question of the motorman's negligence in not slackening the speed of the car is for the jury, where several witnesses testify that when the boy started to cross the street he was but eight feet from the track, and was in full view of the motorman, and that the car was then sixty-five to seventy feet from the crossing.¹⁵

A little girl, about four years old, was run down and injured by an electric car. The testimony as to the circumstances of the accident were conflicting. The undisputed facts were that the street was one hundred feet wide, the car tracks were twenty-five feet from the curb, and at the time of the accident the street was clear of obstruction. The child, who approached the track diagonally in the direction in which the car was running, was seen by the motorman when the car was one hundred feet from the point where she reached the tracks. The testimony for the plaintiff tended to show that the child had not changed her course, nor stopped from the time she left the curb until the time she was struck by the car, and that no effort was made by the motorman to stop the car until she was within a few feet of the tracks. On the other hand, the testimony for the defendant tended to show that the girl when within five or six feet of the tracks, and eight or ten feet from the car, turned towards the sidewalk, that the motorman had brought the car nearly to a full stop, and then assuming that there was no danger of an accident, released the brakes, and as the car moved forward the child suddenly turned and ran in front of it. It was held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained.¹⁶

Where a little boy, six years old, is injured by being run over by an electric car on a dark night, the case is for the jury where the witnesses for the plaintiff, although contradicted by witnesses for the defendant, testify that at the time of the accident there were no lights on the car and no bell was rung.¹⁷

A child, about four years old, was injured by being run

15 *Thompson v. United Trac. Co.*, 193 Pa. 555 (1899.)

16 *Woelckner v. Erie Electric Motor Co.*, 176 Pa. 451 (1896.)

17 *Welsh v. United Traction Co.*, 202 Pa. 530 (1902.)

down by a street car. From the testimony it appeared that the car was at a full stop at the end of its route. When the motorman was about to start it, the plaintiff left a chair on which she had been sitting on the sidewalk and crossed the street to the curb on the other side, and then turned and walked back to the middle of the track, where she stopped and stood, apparently confused by cries of alarm from a number of persons who saw her danger. When she started to cross the street the car was within three hundred feet of her, and when she turned to recross it was not more than one hundred and twenty feet from her, and she was less than twelve feet from the track. The street was but twenty-nine feet in width between the curbs; it was entirely free from vehicles and there was nothing to obstruct the view. The motorman was not looking ahead, but to one side toward a passenger, who was riding on the front platform. It was held that the question whether, if the motorman failed to look ahead he was negligent, or that if he looked and saw the child he was negligent in not controlling the motion of the car so as to avoid injuring her was for the jury.¹⁸

Where a child of tender years was struck by a car of defendant company and severely injured, the case is for the jury where the evidence for the plaintiff, although contradicted, tended to show that the motorman saw the child within a sufficient distance to have stopped his car before striking it.¹⁹

Where the evidence is conflicting as to how long a child of tender years has been on a track, and at what distance the driver might have seen the child, had his attention been directed to the track, the case is for the jury.²⁰

Where an infant of tender years, in plain view of the motorman, started to cross the street when the car was at least one hundred feet away, and when according to the testimony of the motorman himself on cross-examination, "the car was going as fast as the car could go," the case is for the jury,

18 *Kroesen v. New Castle Electric Str. Ry. Co.*, 198 Pa. 26 (1901.)

19 *McCullough v. Pittsburg, Allegheny & Manchester Trac. Co.*, 183 Pa. 241 (1897.)

20 *Johnson v. Reading City Pass. Ry.*, 160 Pa. 647 (1894.)

and a verdict and judgment for plaintiff was sustained upon appeal.²¹

An infant, not quite two years old, was struck and injured by a car of defendant company. The only person who saw the accident testified that he was on the side of the street next to the west-bound track when he saw the child on it, facing the approaching car, about one hundred and fifty feet from where he was standing, and that the car was about the same distance west of the child, or three hundred feet from him; that he saw her going up the west-bound track, and fearing an accident, started to run for her and when she was about two car lengths from the car, she crossed over to the east-bound track and was struck; that he saw the car as soon as he saw the child, and the motorman was in plain view, and when she crossed over to the east-bound track, about two car lengths in front of the car, he waved for the motorman to stop; it was held that the case was for the jury, and a verdict and judgment for the child was sustained.²²

Darting in Front of Cars.

243. A street railway company cannot be charged with the death of a child of tender years where it appears that the child darted in front of the car before the motorman could stop it, and that the car was not run at an unusual rate of speed.

A girl, seven and a half years of age, was killed after dark by an electric car. The only person who saw the accident was a boy ten years old, who testified that as the car came along the little girl, who had been standing on the pavement, started to run across the street diagonally in front of the car, at a point where there was no crossing. The driver called out to her, "Hey, there," but she answered, "Never mind, I can get apast." The boy testified that the car was going fast, but he did not say that it was going faster than usual. He stated that the car slid two feet after the child was run over, but the evidence left it uncertain as to what part of the car passed

²¹ *Nolder v. McKeesport, Wilmerding & Duquesne R. R.*, 201 Pa. 169 (1902.)

²² *Jones v. United Traction Co.*, 201 Pa. 344 (1902.)

over the child. It was held that a non-suit was properly entered.²³

A child, six years old, was struck and injured by an electric car. It appeared that the child started to cross the street, then stopped, and when the car was about ten feet from her, turned suddenly and ran upon the track. The motorman did his best to stop the car, and it only traveled about eighteen feet from the time the child started to run across the track until the car was stopped. It was held that the company was not liable.²⁴

Where the undisputed testimony established that the death of an infant was caused by his suddenly darting upon the track, immediately in front of an approaching car, and that it was not possible to stop the car in time to prevent the accident, the company is not liable.²⁵

If a child of eleven years, after turning on to a street and walking about eighteen or twenty feet, turns suddenly and runs diagonally into the street in such a manner as to come in contact with the side of a passing car near its front end, he cannot recover damages for his injuries.²⁶

If the death of a boy, sixteen years of age, is occasioned by his suddenly running against the car or upon the track immediately in front of it, before the motorman could stop the car, there can be no recovery for his death.²⁷

A boy, thirteen years old, ran diagonally across a street, not a crossing, but at a place where he could have seen a street car if he had looked. He continued running until he suddenly ran against the car, or came so close to it that it necessarily ran against him. The boy was injured. It was held that the street railway company was not liable.²⁸

A boy, twelve years old, was playing with some other boys on his way home from school, and while following some of his companions across the street, he ran on to the track when a car was but a few feet away. One of his companions called

23 *Flanagan v. Peoples Pass. Ry. Co.*, 163 Pa. 102 (1894.)

24 *Fleishman v. Neversink Mountain R. R.*, 174 Pa. 510 (1896.)

25 *Callary v. Easton Transit Co.*, 185 Pa. 176 (1898.)

26 *Miller v. Union Traction Co.*, 198 Pa. 639 (1901.)

27 *Mulcahy v. Electric Traction Co.*, 185 Pa. 427 (1898.)

28 *Funk v. Electric Traction Co.*, 175 Pa. 559 (1896.)

to him to look out for the car, and as he did so he stopped, but looked in the opposite direction from that in which the car was coming, and was struck and killed. It was held that there could be no recovery for his death.²⁹

Where the preponderance of the evidence is in effect that an infant, three years old, ran suddenly upon the track in front of a horse car and was knocked down and hurt before the car could be stopped, a verdict and judgment for defendant will be sustained. The mere fact that the driver had his hand back adjusting his chair at the time of the accident, is not sufficient to convict the company of negligence.³⁰

A little girl of tender years was playing with several other children, and as defendant's car approached, suddenly started to run across the street in front of the car, and reached the track just in time to be struck by it. The motorman perceived the movement of the child and at once applied the brake with such force as to attract attention from people who were indoors for some distance along the street, and with such effect as to stop the car from twenty to forty feet. It was held that the company was not liable for the accident.³¹

Where a boy was struck by a car of a traction company and dragged some distance under the car, through no negligence of the company, and the motorman uses his best judgment in extricating the boy from beneath the car, the company cannot be held responsible, even although the acts of the motorman result in further injury to the boy.³²

An infant, six years old, was injured by a car of defendant company. A witness for the plaintiff testified that the plaintiff ran across the street in front of the car, and that while on or near the defendant's railway track, he fell with one foot across one of the rails. Before he could lift his foot from the rail the car was upon him and his foot was injured. He testified further that the distance between the car and the plaintiff, when he fell, was sufficient to have given the driver of the street car opportunity to bring his car to a full stop before

²⁹ *Pletcher v. Scranton Traction Co.*, 185 Pa. 147 (1898.)

³⁰ *Kierzenhowski v. Philadelphia Trac. Co.*, 184 Pa. 459 (1898.)

³¹ *Kline v. Electric Trac. Co.*, 181 Pa. 276 (1897.)

³² *Trussell v. United Traction Co.*, 31 Pitts. 15 (1900.)

reaching the fallen boy. Five or six witnesses testified in a manner that tended with more or less directness to contradict him. In no particular relating to the failure of the driver to do his full duty was the plaintiff's witness corroborated by a single witness or circumstance. The court in its charge to the jury alluded to him as an example of a class of witnesses whose testimony sustained the plaintiff's case. A verdict and judgment for plaintiff was reversed, as it was held that the court should have called the attention of the jury to the facts affecting the credibility of plaintiff's witness and the contradictions in his testimony.³³

Where the testimony of even the plaintiff's witnesses tended to show that a child of seven years was so close to a car when he ran across the street in front of it, that it was not possible for the motorman to stop the car in time to avoid the boy being run over and injured, the case is for the jury and a verdict and judgment for the defendant was sustained.³⁴

A boy was riding on the side steps of a freight car, which was running north on a street on which the defendant's cars ran south. The freight car could be seen by the motorman when it was 300 feet distant, but the boy could not be seen until the car was but 150 feet distant. The cars approached at the rate of fifteen miles an hour, and as soon as the motorman saw the boy he called to him and made gestures to indicate that he should jump off the step, or climb on the bumper at the end of the car, but the boy disregarded the warning and was killed. It was held that the motorman was not guilty of negligence, and that a non-suit was properly entered.³⁵

A child, six years old, was playing with a number of other children on a vacant lot abutting on the north side of the street upon which defendant's electric railway was operated. This lot was a usual play ground for children and was known to be so by the motorman. Immediately before the accident plaintiff was playing at a point about forty feet from the curb line of the street, when he suddenly ran out from a group of other children, and without stopping ran upon the street and came

33 *Fineberg v. Second & Third Streets Pass. Ry.*, 182 Pa. 97 (1897.)

34 *Hunter v. Consolidated Traction Co.*, 193 Pa. 557 (1899.)

35 *Ackerman v. Union Trac. Co.*, 205 Pa. 477 (1903.)

in contact with the car as soon as he reached the railway track. The distance from the curb to the track was about five feet; the car approached the place of the accident on a descending grade, running, as was testified to by the motorman, by gravity, at the rate of about five or six miles an hour. One of plaintiff's witnesses testified that the car was going at such a rate of speed as to attract his attention before it reached him; another testified that it was going at the rate of ten or twelve miles an hour, while another that it "was going at the rate of three or four steps to his one." The motorman's testimony that he sounded his gong was contradicted by four of plaintiff's witnesses. It was held that it would have been grave error for the court to have withdrawn the case from the jury by instructing them as requested, that their verdict "must be for the defendant."⁸⁶

A street railway company in obedience to the direction of the supervisors laid their tracks eight inches lower than the surface of the road. A mound was formed between the tracks and the traveled part of the road, upon a part of the road over which the company had no control. A little child, six years old, while playing in the street was told by her older sister to cross the road to her home, but to be careful of a car which was approaching. The child walked to within five feet of the tracks and stopped for the car to pass. She stood there until the front part of the car passed her, and was killed either by tripping in crossing the mound and falling in front of the car wheels, or was thrown down by coming in contact with the side of the car. It was held that as the accident might have happened if the tracks had been as high as the surface of the rest of the road, and as there was no negligence on the part of the company, there could be no recovery for the death of plaintiff's daughter.⁸⁷

Accidents on Cars.

244. When a motorman discovers a child of tender years on the platform of his car, it is his duty to stop and take the

³⁶ Walbridge v. Schuylkill Electric Railway Co., 190 Pa. 274 (1899.)

³⁷ Miller v. Lebanon & Annville Str. Ry. Co., 186 Pa. 190 (1898.)

child inside or put him off, and failure to do so instantly becomes negligence.³⁸

A boy, seven years and eight months old, became a passenger on a street car without any one accompanying him. After going into the car, the conductor subsequently found him standing on the platform and sent him into the car. The conductor subsequently left the car and it was in the sole charge of the motorman. When the car approached the crossing at which the plaintiff desired to alight, he went on to the front platform to tell the motorman where he wanted to get off. He remained on the platform with the motorman's knowledge without objection or warning, while the car ran for a distance of from one-fifth to one-half a mile. When near the crossing where he wished to get off, plaintiff stepped down on the step and held fast to the railing. As the car passed the crossing, he either stepped or jumped off and was injured. The court left it to the jury to find whether the motorman was negligent in permitting the boy to ride on the front platform, but declined to submit the question of the plaintiff's contributory negligence. It was held that the court committed no error.³⁹

Plaintiff, a boy eight years old, was playing on a detached trailer car when a motor car arrived to pick up the trailer. The conductor of the motor car roughly called to the boy to get off the car. The boy ran through the car to the front end, ran down the steps to the lower step, and instead of getting off, crawled around the front dashboard and dropped off in the middle of the track. Just as he fell the car started forward and crushed his leg. It was held that as the boy was a trespasser, the company owed him no duty except to not wantonly injure him, and as there was no negligence on the part of the traction company, a non-suit was properly entered.⁴⁰

A child, seven or eight years old, attempted to get upon the front platform of a street car. The car had stopped to let off a passenger. The boy approached the front platform, placed his hand upon the rail or handle next to the body of the car, and just as he was about to place his foot upon the step the car

38 *Levin v. Second Ave. Trac. Co.*, 194 Pa. 156 (1899.)

39 *Parker v. Washington Electric Street Railway*, 207 Pa. 438 (1904.)

40 *Pope v. United Trac. Co.*, 30 Pitts. 62 (1899.)

started and he was thrown under the wheels. He gave no signal to either the conductor or driver of his purpose to enter the car. It appeared that the conductor could have seen the boy if he had looked, and that he did not look. There was proof that no fender was used on the car. The car was started in the ordinary way. It was held that the railway company was not liable for the injuries sustained by the child.⁴¹

Force or that which is tantamount to it cannot be used to the injury of child trespassers. Responsibility for their care rests with their parents and guardians. Plaintiff, a boy six years old, with two other boys, got upon the side steps of an open summer car of defendant company and sat down on the step about the middle of the car with his body facing the motorman and his head turned toward the conductor. He was discovered by the conductor and while the car was in motion was told by him, without act or gesture or tone of voice calculated to cause fright to "get off." The boy jumped without waiting for the car to slow down and was injured. It was held that neither the boy nor his father could recover damages for the injuries he sustained. Penny-packer, J., said: "It is contended that it was the duty of the conductor to stop the car and to see to it that the plaintiff was put down gently and in such a way that he could not hurt himself. Is there such a duty? We know of no Pennsylvania case where it is so held, and the principle does not commend itself to approval. However meritorious it may be to save children and others from impending danger, we are not required to offer our aid under penalty of damages for refusal. To hold that such a duty exists is in effect to say that the cars are run for the benefit of trespassers. To require the stopping of a car in order to put off intruders might be, upon certain occasions, a great embarrassment to both the company and the passengers. A school of trespassing children could lawfully stop the running of a railroad. The true rule would seem to be the one deduced from our cases and upon which the most of them can be reconciled, that force or that which is tantamount to it cannot be used to the injury of child trespassers, but that

41 *Pitcher v. Peoples Street Ry. Co.*, 174 Pa. 402 (1896.)

the responsibility for care over them rests with their parents and guardians."⁴²

Accidents at Stations.

245. When a street car company invites the public to use its line to visit a park or other public place of amusement or recreation, and thereby induces large crowds of people to assemble at its stations in such place, the company must use reasonable care in handling the people and in protecting them from injuries arising from the conduct of the crowd in entering and leaving its cars. What means shall be employed to ensure the safety of persons on such occasions must be left to the company subject, however, when the question is raised to the approval or disapproval of the proper legal tribunal.

Plaintiff, a boy of fourteen years of age, accompanied by his sister and her husband, visited a pleasure park to which the defendant company had extended its tracks. On the evening of the accident about three thousand people were in the park. The defendant maintained a proper and safe platform for receiving departing passengers, but permitted the platform to become unduly crowded. When the plaintiff was on the platform waiting for a car, a crowd of from one hundred and fifty to two hundred persons were gathered on the platform waiting for a single car to carry them to their destination. The car was a summer car, with a running board on each side, with a seating and standing capacity of about ninety persons. There was no person in charge of the gateway used as an entrance to the station, nor was there any officer or person at the station to control or direct the movements of the crowd. As soon as the car entered the gate the crowd rushed for it, and according to one of the witnesses, "they were climbing all over it and jumping on and knocked down people and everything else." As the car proceeded in the enclosure, the people hanging on it, and projecting from the running board struck plaintiff's sister, who fell against her brother and knocked him under the wheels, severely injuring him. It was held that the question of defendant's negligence, as well as the negligence of the father

⁴² Feingold v. Philadelphia Traction Co., 21 Pa. C. C. R. 183 (1898); 7 Dist. 445 (1898); 4 Lacka. 290 (1898.)

in permitting his son to go to the park under the circumstances was for the jury.⁴³

Contributory Negligence of Parents.

246. If a parent by his or her neglect of the duty of protection to a child of tender years, contributes to the injury of the child, there can be no recovery, although the defendant may also have been negligent.

In a case where a child, twenty months old, was run over by a horse car, it appeared that the mother of the child was a young married woman who did her own housework. Just before the accident she left the boy in the kitchen and accompanied some visitors to the front door. While standing at the door and talking to her visitors, the child slipped by the mother at the door, crossed the intervening sidewalk and street, a distance of about twenty-eight feet, to the farthest track of the railroad, where, in the immediate view of the mother, it was killed. The mother even did not know that it was her child until after the accident. It was held that the contributory negligence of the mother barred a recovery.⁴⁴

A father left his child of two and one-half years of age, on the front steps of his house, facing a public street, where electric cars and wagons were passing, while he took a smaller child into the house, intending to return in a few moments. It appeared that there was a hand organ playing on the opposite side of the street, and that he enjoined the child not to leave the step. During the absence of the father the child wandered upon defendant's tracks and was killed. The parents were in humble circumstances and were obliged to take care of the children themselves. It was held that the action of the parents was not such as to require the court to pronounce it to be such contributory negligence on his part as to require the withdrawal of the case from the jury.⁴⁵

In a case where a child of tender age is injured by the negligence of a motorman, the question of the parents' contribu-

43 *Muhlhouse v. Monongahela Street Ry. Co.*, 201 Pa. 237 (1902.)

44 *Johnson v. Reading City Pass. Ry.*, 160 Pa. 647 (1894); *Phillips v. Duquesne Trac. Co.*, 8 Super. Ct. 210 (1898); 29 Pitta. 60 (1898.)

45 *Karahuta v. Schuylkill Trac. Co.*, 6 Super. Ct. 319 (1898.)

tory negligence in not properly protecting the child is for the jury, where the evidence tends to show that the mother had asked her brother, the child's uncle, a boy fourteen years old, to go to a store on the opposite side of the street for a loaf of bread; that the child begged to go with him; that the mother carried the child across the street and left him on the pavement in care of his uncle; that the two children walked down the street together a short distance, when the younger asked the older to get him a piece of ice from a wagon standing on the other side of the street; that the boy cautioning the child to remain where he was, ran across the street, got the ice and started to return when he noticed that the child was following him, and was then on the car track; that the car was at the distance of the width of two or three stores, and moved so rapidly that the child was struck before he could reach him; that the uncle of the child was a member of his sister's family, and had frequently aided in taking care of the child.⁴⁶

A father is guilty of contributory negligence and can not recover for injuries to his child if he allows his son, only six years old, to go out on the street in a very dark place, at eight o'clock at night, walking across a street where street cars run.⁴⁷

Plaintiff kept a store on a street traversed by a street railway company. He left his two children, aged six and four years respectively, playing on the pavement in front of his store, and went away for a few moments to a place where he could neither see nor hear what the children were doing. After he had been away two or three moments he heard a cry, and running out into the street, found his child had been killed. It was held that the plaintiff was guilty of contributory negligence and could not recover damages from the traction company for the death of his child.⁴⁸

Where want of care on the part of the parent is manifest and indisputable, the court should declare its presence and effect. Where the measure of care depends on varying cir-

⁴⁶ *Harkins v. Pittsburg, Allegheny & Manchester Traction Co.*, 173 Pa. 146 (1896); 26 Pitts. 375 (1896.)

⁴⁷ *Welsh v. United Traction Co.*, 202 Pa. 530 (1902.)

⁴⁸ *Schwartz v. United Trac. Co.*, 30 Pitts. 153 (1899.)

cumstances, the question is for the jury. The mere fact of incapacity in the child neither creates nor shields from liability. If there be negligence by the defendant and no negligence by the parent, want of discretion in the child is no defence.⁴⁹

To permit a child who is not of an age to understand and avoid danger to wander on the streets of a city unattended is such negligence on the part of parents as will prevent a recovery by them, but if the evidence discloses that the parents took some precautions, but in spite of them the child escaped and was injured, the question of contributory negligence is for the jury. A child of tender years in charge of an elder sister was allowed to cross a street, and after returning to the door of her father's house, disobeyed the direction of her sister to follow her and unobserved ran into the street. Her escape was noticed within a moment or two and an elder brother was sent after her, but she was injured by a car of defendant company before he could reach her. The court held that the case was for the jury.⁵⁰

In an action for the death of a child four years old, it appeared that immediately prior to being run over by an electric car the child was seated on a chair on the sidewalk; that its mother and father were at an open window, about twenty-five feet away, and that the child's nurse was standing on the pavement near the child. The court held that the question of the parent's contributory negligence was for the jury.⁵¹

In an action by a father to recover damages for personal injuries to a child, two years old, the court cannot declare as a matter of law, that the parent was negligent where it appears that immediately before the accident the child was playing in a front room of her father's house, that an elder sister was watching her, while scrubbing the boardwalk in front of her home, and that when the sister went to the rear of the house to get a bucket of water and returned after a moment or two, the child had gone from the house and was struck by a car on the street.⁵²

49 *Phillips v. Duquesne Trac. Co.*, 8 Super. Ct. 210 (1898.)

50 *Woekner v. Erie Electric Motor Co.*, 182 Pa. 182 (1897.)

51 *Kroesen v. New Castle Electric Str. Ry. Co.*, 198 Pa. 30 (1901.)

52 *Jones v. United Traction Co.*, 201 Pa. 346 (1902.)

A family, consisting of parents and eight children, were in very moderate circumstances. The mother had only such aid in caring for the little children as the older ones could give. One of the children, a boy four and one-half years old, was run over and killed by an electric car. On the day of the accident two of the daughters were absent at church and the father was reading a newspaper in the house. The mother washed and dressed the boy, who was subsequently killed, and permitted him, with a brother eight years old, to go to a coal box in a neighboring street where there was no railway track. While dressing another child she sent a daughter for the two boys. The eldest returned, but the little one refused. The mother immediately sent again for him, but before he was reached he had run on to a street where he was struck by an electric car and killed. It was held that the contributory negligence of the parents was for the jury, and that a verdict and judgment for the parents should be sustained.⁵³

A parent left her daughter, an infant of three years, in the kitchen in charge of a servant, who left to go to a grocery store a square distant. In her absence the infant wandered from the house out into the street and upon the trolley tracks and was killed by a passing car. The evidence showed that the trolley car was running at the rate of eight or ten miles an hour and that the accident occurred near a school house, from which school children were coming out, and that the motorman kept his eyes fixed upon the motions of a single child on one side of the track, to the exclusion of many others on the street. It was held that it was for the jury to determine whether the motorman was negligent and whether also there was any contributory negligence on the part of the parent.⁵⁴

Plaintiff's child, a girl of two years and three months, being left alone a moment in the dining room while the mother went up stairs, wandered through the kitchen into the yard, out through the back gate, and getting upon the track was killed by a passing trolley. The evidence tended to show that at the

⁵³ *Evers v. Philadelphia Traction Co.*, 176 Pa. 376 (1896.)

⁵⁴ *Buente v. Pittsburg, Allegheny & Manchester Trac. Co.*, 2 Super. Ct. 185 (1896.)

time of the accident and immediately before, the motorman was engaged in conversation with a person in the cab of the car. It was held that the case was for the jury and that a verdict and judgment for plaintiff should be sustained.⁵⁵

A boy five years old, was killed near his home by an electric car. The evidence showed that the mother just prior to the accident was in the kitchen of the house washing the baby, and that she told the boy who was killed, not to go away. The boy left the house without the mother's knowledge, and went into the street, where he was killed by an electric car running at a high rate of speed. It was held that the case was for the jury.⁵⁶

In an action by a father to recover damages for personal injuries to a minor child, it is error for the court to allow the defendant to prove that plaintiff was in the habit of permitting his child to go upon the street, where he was killed, without some one in charge of him.⁵⁷

Evidence.

247. In an action to recover damages for the death of an infant, six years old, the motorman of the car which caused the accident, not being a party or a person having legal interest in the suit, cannot be compelled to testify as if under cross-examination by the plaintiff.⁵⁸

Where a city ordinance gives street cars running north and south a right over street cars running east and west, failure to comply with the ordinance is merely evidence of negligence, and is not negligence per se.⁵⁹

55 *Henne v. Peoples Street Ry. Co.*, 1 Super Ct. 311 (1896.)

56 *Dunseath v. Pittsburgh, Allegheny & Manchester Traction Co.*, 161 Pa. 124 (1894.)

57 *Lawrence v. Scranton Traction Co.*, 3 Lacka. 101 (1897.)

58 *Callary v. Easton Transit Co.*, 185 Pa. 176 (1898.)

59 *Connor v. Electric Traction Co.*, 173 Pa. 602 (1896.)

CHAPTER XXXVIII.

NEGLIGENCE—STREET RAILWAYS—INJURIES TO EMPLOYEES.

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| 248. Duty as to Instructions. | 252. Fellow Servants. |
| 249. Tools and Appliances. | 253. Conductors. |
| 250. Risk of Employment. | |
| 251. Contributory Negligence of Employees. | |

Duty as to Instructions.

248. A blacksmith's helper employed by an electric railway company, if taken upon special duty to repair the lines, which is admittedly dangerous, has a right of action, if he is injured in employment to which he was ordered without warning as to its danger. Plaintiff was a helper in the defendant's blacksmith shop. Late one night he and several others were taken to a point on defendant's lines and were ordered by the chief electrician to detach from the iron poles some of the span wires supporting the trolley, and plaintiff while so employed received an electric shock, causing him to fall from the ladder whereon he was working, to the ground, thus sustaining severe injuries. It was held that it was for the jury to determine the question of defendant's negligence and the plaintiff's contributory negligence.¹

If a conductor of a street railway company who has been employed on a double track railway for some nine years in running closed cars, is assigned an open summer car, the company is not bound to give him warning or instructions as to the open cars, and if he is injured while standing on the running board, between double tracks, by being struck by a passing car he is guilty of negligence and cannot recover.²

¹ Stapleton v. Citizens Trac. Co., 5 Super. Ct. 253 (1897.)

² Fletcher v. Philadelphia Trac. Co., 190 Pa. 117 (1899.)

Tools and Appliances.

249. Where an employee of a traction company is injured in a collision which resulted from a defective brake, of which defect the superintendent had notice before the accident, the question of the negligence of defendant company in not remedying the defect or taking the car from service is for the jury.³

A street railway company cannot be charged with negligence in abolishing the use of sand boxes on the cars because the wheels of the cars had become flattened by that method of sanding the tracks, and substituting another system by which sand was placed on the track by a man employed for that purpose, where there is no proof that the change was improper or that the new system was inefficient or accompanied with danger, and if the rails have not been properly sanded by the man whose duty it was to sand them, in consequence of which a conductor is injured by a collision with another car, his injury is the result of the negligence of a fellow servant, for which the company is not responsible.⁴

Risk of Employment.

250. Plaintiff, a motorman employed by defendant company, while running his car on a dark and foggy night, collided with two cars, loaded with stone ballast, crushing one of his legs to such an extent as to render it necessary to amputate it. The stone cars belonged to certain contractors, who had been engaged by the defendant company to ballast a portion of their road, and at the time of the accident were in charge and under the control of the employees of the contractors. The movements of both the company's and contractors' cars over the road were governed by a block system of electric signals, operated by the employees, and the accident was caused by the failure of an employee of the contractors to throw the proper warning signal when he entered with his cars the block in which the accident happened; it was held that the plaintiff could recover.

In such a case plaintiff could not be charged with contribu-

3 *Kingan v. Pittsburg Trac. Co.*, 5 Super. Ct. 436 (1897); 28 Pitts. 128 (1897.)

4 *Smith v. Philadelphia Traction Co.*, 202 Pa. 54 (1902.)

tory negligence in remaining in the service of the company after the contractor was allowed to use its tracks. "Negligence under the circumstances was not to be presumed, or even anticipated; on the contrary both passengers and employees had a right to assume that the road, signals, etc., were being used by the contractors' employees, under the supervision and control of the defendant company, and in such a manner and under such rules and regulations as to secure the safety of both. The defendant company could ballast the road itself or select an agent to do it. Entering into a contract with contractors to do the work was perfectly legitimate and not negligence per se. It could not, however, contract to be absolved from liability for injuries inflicted upon its passengers or employees by reason of the negligence of its agents."⁵

A motorman was injured while running an extra car between regular cars; he had been engaged in this occupation for twenty-seven days. At the time of the accident while plaintiff's car was on a single track the trolley pole slipped, resulting in the stopping of the car and the extinguishment of the lights. Plaintiff went back of the car to replace the trolley and while on the track was struck by a car coming on in the dark. Plaintiff alleged that the company was negligent in operating the line without signals. It was held that such injuries were the result of the risk of his employment, and that a non-suit was properly entered.⁶

Contributory Negligence of Employees.

251. An employee of a street railway company is guilty of contributory negligence if in departing from a car barn he chooses out of the possible places of exit, the only one of visible danger.⁷

An employee of a railway company in traversing or departing from a car barn where he is employed is bound to use

⁵ *Ortlip v. Philadelphia & West Chester Trac. Co.*, 9 Dist. 291 (1900); affirmed by 198 Pa. 586 (1901.)

⁶ *Simmons v. Southern Traction Co.*, 207 Pa. 589 (1904.)

⁷ *Collins v. Second Avenue Traction Co.*, 7 Super. Ct. 318 (1898); 28 Pitts. 460 (1898.)

the same degree of care as that imposed upon users of the highways, and imposes upon him an obligation to use reasonable care for his own safety and to avoid an open or apparent danger.

Plaintiff, who was an "extra" conductor, went to the car barn of the defendant company to ask for work and having been informed that there was no car for him, started out of the car barn, and in passing out was struck by a car. Plaintiff alleged that he would not have been struck if the motorman had sounded his gong. The evidence was undisputed that there were two other exits familiar to the plaintiff from the car barn, which he could have used with perfect safety, and that the exit which he used required him to use a space of but a few inches, where if a motionless car, which the plaintiff knew was about to be started, should move, plaintiff must inevitably be crushed. It was held that plaintiff was guilty of contributory negligence and could not recover damages from the company.⁸

The rule that persons about to cross a street railway track must not only look when first entering the street, but must continue to look until the track is reached, applies to motormen upon street railway cars, and if a motorman is injured by failure to observe this rule, he cannot recover from the company, although the car which he is operating has the right of way over the car with which he collides; the motorman first reaching a street crossing may not go on and by casting the whole burden of care upon the other, imperil the property of the company and the lives of his passengers.⁹

Fellow Servants.

252. A man employed by a street railway company to sand the tracks is a fellow servant of a conductor.¹⁰

A motorman employed by a street passenger railway company is not a fellow servant of an employee of contractors who

⁸ *Collins v. Second Avenue Traction Co.*, 7 Super. Ct. 318 (1898); 28 Pitts. 460 (1898.)

⁹ *Bobb v. Union Trac. Co.*, 206 Pa. 265 (1903.)

¹⁰ *Smith v. Philadelphia Traction Co.*, 202 Pa. 54 (1902.)

were engaged by the company to ballast the road under their supervision and control.¹¹

Conductors.

253. In an action against a street railway company by a conductor in the employ of another street railway company to recover damages for personal injuries suffered in a collision between the car upon which plaintiff was employed and a car of the defendant, the case is for the jury where the evidence for the plaintiff, although contradicted, tended to show that the plaintiff's car, while running on the roadbed of his own company ran into defendant's, which had been negligently run in front of plaintiff's car in such a manner as to render a collision inevitable.¹²

Deceased was a conductor of a car of defendant company. It appeared that his car had been stopped at the terminus of the line for the purpose of enabling an inspector to test the electrical appliances. While the inspection was being made the motorman stood upon the ground within arm's length of the controller handle and assisted the assistant inspector in manipulating the controller. The inspector was within the car, as was also the conductor. The test occupied but a few moments of time, and when it was over the inspector signified that the test was completed, and there was some evidence to show that upon the completion of the test the inspector said "All right, put on your pole." Immediately afterward the assistant inspector stepped down from the front platform. The motorman was in the act of stepping upon the platform to take his regular place, when the car suddenly started and ran a distance of its own length and stopped. A cry was heard and the conductor was found lying crushed beneath the end of the car. The deceased had untied the trolley pole from the rear platform as was his custom at this point, had swung the pole around to the other end of the car and immediately upon its coming in contact with the overhead wire the car had started and run against him, knocking him down and crushing out his

¹¹ *Ortlip v. Philadelphia & West Chester Trac. Co.*, 9 Dist. 291 (1900); affirmed by 198 Pa. 586 (1901.)

¹² *Wetzel v. Philadelphia Traction Co.*, 184 Pa. 407 (1898.)

life. The inference to be drawn from the testimony was that the controller had been left open for the reception of the power, since power could only be communicated to the car when the controller was open and when at the same time the trolley pole was upon the wire. It was held that there was no evidence of any negligence on the part of the company, and the deceased was not entitled to recover.¹³

Two street railway companies used a double track in common to a point where the cars of the defendant turned to the south on a switch to reach their terminus. As a west-bound car of this company turned on the switch it collided with an east-bound car of the other company on the south track. In an action by the conductor of the west-bound car, who was injured by the alleged negligence of the motorman of the west-bound car, it was held that the Act of 1868 did not apply.¹⁴

Although a witness has testified that an accident to a conductor was caused by the fact that a street railway company had abolished the use of sand on its cars and had refused to supply sand on the cars, he may be permitted on cross-examination to testify that after the company abandoned the use of sand on the cars they had established a new system by which a man was placed on the tracks to place sand on the streets wherever needed.¹⁵

13 *Shugard v. Union Traction Co.*, 201 Pa. 562 (1902.)

14 *Wetzel v. Philadelphia Trac. Co.*, 184 Pa. 407 (1898.)

15 *Smith v. Philadelphia Traction Co.*, 202 Pa. 54 (1902.)

CHAPTER XXXIX.

TRAVELING ON SUNDAY.

254. Operating Street Cars on Sunday.

255. What Trains are Necessities.

256. Repairing Cars on Sunday.

Operating Street Cars on Sunday.

254. The running of street cars on Sunday in a large city and its suburbs is a necessity and is not in violation of the Act of 1794. "The question whether a given act is a work of necessity or not depends not upon the conditions and situations as they existed in 1794, or fifty or thirty-five years ago, but upon conditions as they presently exist. What was deemed a necessity generations ago may not be looked upon as a necessity to-day; and what was not thought of even as a convenience no more than a generation ago, may very well be and is in some instances, a necessity to-day. The universal usage of the present time is valuable testimony upon the question whether a thing is presently a necessity or not; and the most enlightened opinion based upon conditions as they existed thirty-five or fifty years ago, is not at all conclusive of that question to-day. Having regard to conditions as we know them to be at the present time the necessities of the people of a large city, the necessities of persons residing in the suburbs and so many other obvious considerations, that it would be a waste of time to enumerate them, I am of the opinion and so decide that the running of street cars on Sunday is not a violation of the Act of 1794."¹

What Trains Are Necessities.

255. Mail and church trains and trains carrying fast or perishable freights are necessities within the meaning of the Act

¹ Com. *ex rel. v. Berks County Prison Warden*, 11 Dist. 45 (1901), per Endlich, J.

of 1794. Doubted, whether a limited number of passenger trains would not now be considered a necessity within the meaning of the Act.²

Repairing Cars on Sunday.

256. Where the employees of a railroad company inspected and repaired certain cars on Sunday, which was necessary in order for the railroad to run certain trains and the work performed was necessary to keep the road open and the cars in running condition, such work is a "work of necessity" within the meaning of the Act of April 22, 1794.³

² *Com. v. Robb*, 3 Dist. 701 (1894); 17 Pa. C. C. R. 350 (1894.)

³ *Com. v. Robb*, 3 Dist. 701 (1894); 17 Pa. C. C. R. 350 (1894.)

CHAPTER XL.

OFFICERS AND AGENTS.

257. Company Bound by Acts of Agents.

258. President and Directors.

Company Bound by Acts of Agents.

257. A check drawn by the treasurer of a street railway company without a formal order of the directors, as required by the by-laws and endorsed by the president, is good in the hands of one without knowledge of the by-laws, where it appears that the president had deposited in the company's account a sum out of his own moneys sufficient to meet the check, and the company had appropriated this sum to other corporate purposes.¹

The by-laws of a corporation, upon their adoption, become written into the charter and put parties who deal with the corporation upon notice, in trading with the officers of the corporation as to the extent and power of such officer, and this whether the specific by-law has been brought home to them or not.²

Where the common seal of a corporation is affixed to an instrument and the signatures of the proper officers are proved, the courts will presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority.³

An agreement entered into by an officer of a railroad, on

¹ Wayne Title & Trust Co. v. Schuylkill Elec. Ry. Co., 191 Pa. 90 (1899.)

² Wayne Title & Trust Co. v. Schuylkill Electric Ry. Co., 191 Pa. 90 (1899); Worthington v. Schuylkill Elec. Ry. Co., 195 Pa. 211 (1900.)

³ Little Saw Mill Valley Turnpike Co. v. Federal & Pleasant Valley Pass. Ry. Co., 194 Pa. 144 (1899.)

the faith of which a turnpike company acted, cannot be repudiated by the railroad company, upon the alleged lack of authority of the officer to make the agreement, after the company has reaped the benefits of the agreement.⁴

A street railway company is estopped from denying the validity of a contract made by its officers, where it was submitted at a stockholders meeting, approved by its attorneys and by a large number of its stockholders and no objection was made till six years after its execution.⁵

President and Directors.

258. Where the president of a railroad company, or in his absence, the vice president has been authorized by the board of directors to execute a written contract, it is not within the province of a mere director to execute the contract.⁶

The president of a railroad company, who was practically the owner of all its shares, procured an agreement from the president of a slate company to ship all of their product over their line. The agreement was not authorized by the directors or known to any of them, except the president of the railroad company, who was also a director of the slate company. Under the by-laws the president had no authority to make such a contract, and there was in addition, no evidence to show that the slate company ever ratified the contract. It was held that such a contract could not be specifically enforced by the railroad company.⁷

An electric railway company cannot be held liable on an indorsement of a promissory note by its president where it appears that the president had no authority under the by-laws to make the indorsement, that the corporation received no benefit

4 *Johnstown & Scalp Level Turnpike Co. v. Johnstown Pass. Ry.*, 4 Dist. 594 (1895.)

5 *South Side Pass. Ry. v. Second Avenue Pass. Ry.*, 191 Pa. 492 (1899); 29 Pitts. 435 (1899.)

6 *Gaynor v. Williamsport & North Branch R. R.*, 189 Pa. 5 (1899.)

7 *Bangor & Portland Railway Company v. American Bangor Slate Company*, 203 Pa. 6 (1902); affirming 8 North. 141 (1902.)

from it, and that there was no course of dealing between the parties which misled the plaintiff.⁸

The directors of a railroad company are not entitled to compensation for services, in the absence of any contract or by-law authorizing such payment, made prior to the rendering of the services.⁹

8 *Worthington v. Schuylkill Electric Ry. Co.*, 195 Pa. 211 (1900); affirming s. c. 10 Super. Ct. 117 (1899.)

9 *Grafner v. Pittsburgh, Neville Island & Coraopolis Street Ry.*, 207 Pa. 217 (1903.)

CHAPTER XLI.

CONTRACTS.

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| 259. Contracts Ultra Vires. | 263. Agreement as to Freight. |
| 260. Construction Contracts. | 264. Contract as to Exclusive Privileges at Stations. |
| 261. Agreement to Build Connecting Railroad. | 265. Contract as to Tolls. |
| 262. Railroad Contractors. | |

Contracts Ultra Vires.

259. Street railway companies have not the corporate power to lease advertising space in their cars, but a person who has leased such space cannot, after he has enjoyed the advantages of his contract, repudiate his contract on the ground of its being ultra vires.¹

Construction Contracts.

260. A mortgage given by a railroad company after debts to contractors and others had been incurred, is only illegal and void under the joint resolution of January 21, 1843, P. L. 367, as against "such contractors, laborers and workmen." As between the parties to the mortgage and as against all other persons the mortgage is valid.^{1*}

Where a construction contract between a railroad company and contractors, stipulates that fifteen per cent. of all estimates should be retained by the company, but were not so retained, and subsequently the company brought suit for abandonment of the work, the contractors' sureties can set off the amount of the said fifteen per cent. against any claim of the company on account of expenditures by reason of such

¹ *Pittsburg & Birmingham Trac. Co. v. Seidel*, 19 Pa. C. C. R. 463 (1896); 6 Dist. 414 (1896); 27 Pitts. 441 (1896.)

^{1*} *Fidelity Title & Trust Co. v. Schenley Park & Highlands Ry. Co.*, 189 Pa. 363 (1899); 29 Pitts. 371 (1899.)

abandonment, but not against the penalty of the bond, independent of expenditures.²

An arbitration clause in a contract for the construction of a railroad provided as follows: "The decision of the engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or any other remedy in law or otherwise by virtue of the covenants herein contained, so that the decision of the engineer shall in the nature of an award be final and conclusive on the rights and claims of said parties." It was held that this clause did not apply where no claim is made for work done under the contract and the contract itself has been rescinded and the contractor is suing to recover for the loss of the contract. Mr. Justice Potter in discussing the construction of this clause said: "This precise question was considered by Judge Elcock in *McGovern v. Bockius*, 10 Phila. 438. He was dealing with a similar state of facts, and the clause providing for submission to the engineer was almost identical in its form with that now before us. Speaking with careful discrimination he there says: 'We cannot conceive that the language of this agreement contemplates that the estimate of the engineer should be given on the rescission of the contract. It would not be a natural interpretation of it. The duties of the engineer render his decision valuable and conclusive upon disputes as to the quantity, quality, and kind of work, the change of route, and as to numerous questions relating to the construction of the road; and hence the stipulation in all railroad contracts making his decision final. This was to avoid litigation as to these very nice questions, which are best determined upon the ground, but it was never intended that the engineer should usurp the province of the jury, and upon the rescission of the contract, determine the contractor's damages for the loss of his bargain. It can hardly be supposed that a contractor would put this power in the hands of the company's engineer; at all events it should not be inferred from doubtful language in the agreement.' "

² *Perry County R. R. v. Maginnis*, 12 Lanc. 149 (1895.)

"The question here involved is also squarely ruled by *Lauman v. Young*, 31 Pa. 306, as was there said with emphasis: 'The right of trial by jury will not be taken away by implication merely in any case; it must appear in all cases that the parties have agreed to dispense with it.'

"The same doctrine was applied and emphatically enforced by our Brother Brown, in *Chandley Brothers and Company v. Cambridge Springs Boro.*, 200 Pa. 230, where we held that before the decision of the engineer should be considered final and conclusive, it must clearly appear that such power was given to him.

"In the present case the submission clause in the contract cannot properly be construed to constitute the engineer the final umpire, to determine the plaintiff's right to recover for damages for the loss of the contract."³

Agreement to Build Connecting Railroad.

261. Where two railroad companies contract to build a connecting railroad for their joint use, the expense of maintaining which was to be in proportion to the actual tonnage represented by the two companies, and no time limitation is mentioned in the contract, the rights of the companies under the contract are those of tenants in common, and neither party has the power to change it without the consent of the other. Such a contract, however, is not irrevocable, and either party may give suitable notice of its purpose to withdraw from the arrangement at and after a day named. Thereafter if the parties cannot readjust their relations to each other, the courts must make such ad interim orders as will protect the rights of the parties and secure the preservation and operation of the road.⁴

Railroad Contractors.

262. Contractors engaged in the construction of the road bed of a railroad are not within the contemplation of the Act of May 20, 1891, which requires the semi-monthly payment of

³ *Dobbling v. York Springs Railway Co.*, 203 Pa. 628 (1902); reversing 16 York 92 (1902); see also 207 Pa. 123 (1903.)

⁴ *Philadelphia & Reading R. R. v. River Front R. R.*, 168 Pa. 357 (1895.)

wages to employees; the act applies only to employers engaged in the business of "mining or manufacturing."⁵

Agreement as to Freight.

263. An agreement by a corporation owning a furnace and ore land to give all its traffic to a railroad company in consideration of the latter subscribing to its bonds, is based upon a sufficient consideration, and does not violate the Constitution of Pennsylvania. Such a contract may be specifically enforced by a court of equity.⁶

Contract as to Exclusive Privileges at Stations.

264. A railroad company may contract with one person to furnish the means to carry incoming passengers, or their baggage and merchandise from its stations, and may award to him the exclusive right to solicit the patronage of such passengers.⁷

Contract as to Tolls.

265. Where a traction company entered into a contract with a bridge company that it would pay tolls in consideration of the bridge company building an extension to the bridge for the use of its cars, it is no defence in an action to recover the toll, that a municipality had acquired ownership of the bridge company.⁸

5 *Com. v. Marsh*, 3 Dist. 489 (1894.)

6 *Bald Eagle Valley R. R. Co. v. Nittany Val. R. R.*, 171 Pa. 284 (1895.)

7 *Philadelphia & Reading Ry. v. Godfrey*, 17 York 37 (1903); 19 Montg. 129 (1903); 28 Pa. C. C. R. 326 (1903); 13 Dist. 6 (1903.)

8 *Monongahela Bridge Co. v. Pittsburg & Birmingham Trac. Co.*, 30 Pitts. 115 (1899.)

CHAPTER XLII.

LEASE, CONSOLIDATION AND MERGER.

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| 266. Lease Must Be Based on Legislative Authority. | 270. Liabilities of Lessor. |
| 267. Right of Stockholders to Restrain Merger. | 271. Liabilities of Lessee. |
| 268. Connection of Railroads. | 272. Arbitration Clause. |
| 269. Covenants by Lessor. | 273. Distress. |
| | 274. Forfeiture. |
| | 275. Street Railways. |

Lease Must be Based on Legislative Authority.

266. A railroad company has no right to lease its franchises and road unless it has a legislative grant, either in express terms, or by necessary implication.¹

The officers of a railroad company, organized in New York, entered into a contract with other parties, in which the railroad was not a party, by which they were to share in the profits arising from the construction and equipment of the railroad. Subsequently the railroad company was merged and consolidated with a railroad company organized under the laws of this State.

It appeared that the contract which was made in New York, although void in this State, being in violation of Article 17, Sec. 6, of the Constitution, and the Act of May 15, 1874, P. L. 178, was not void in New York, and not open to collateral attack, though voidable by the corporation. It was held that the contract might be enforced in Pennsylvania.

Mitchell, J., said: "It is very doubtful whether even as regards the corporation itself, contracts legally made by it, could be invalidated by a subsequent act of merger, but however that may be, it is clear that no such effect could be produced upon a private contract between individuals to which the corporation was not a party. Contracts valid by the law of the place and time where they are made and are to be performed,

¹ Van Steuben v. Central R. R. of New Jersey, 178 Pa. 367 (1896.)

are valid everywhere. Being a New York contract between individuals and valid there, when made, it could not be invalidated by a subsequent act of merger by the corporation where-by the latter became subject to Pennsylvania law."²

An inclined plane company, organized under the special Act of March 23, 1870, P. L. (1871) 1462, with power to construct an inclined plane passenger railway with "all the powers and privileges as are contained in the act regulating railroad companies, approved February 19, 1849," has authority to lease its whole system to a passenger railway company where one of the railway lines of the lessor forms a continuous route with the road of the lessee, notwithstanding the break made by the inclined plane.³

Right of Stockholders to Restrain Merger.

267. A railroad lease, executed after the lessee had acquired the majority of the stock of the lessor, ratified by a majority of the stockholders, and not questioned for more than twenty-seven years, will not be set aside on complaint of minority stockholders, where the specific causes of complaint do not clearly appear to be fraudulent. If a stockholder delay six years after acquiring stock and then files a bill to annul a lease, he is guilty of laches.⁴

Connection of Railroads.

268. The Act of April 4, 1868, P. L. 62, contemplates a mechanical connection between two railroads of similar gauge, so as to permit the running of cars from one road to another. In proceedings under the act to establish such a connection the jury is limited to such questions as the determination of the point at which one of the roads must be broken, what switches and sidings shall be constructed by the road seeking the connection, what watchmen or other employees shall be appointed to guard against danger, and which of the roads shall appoint and pay them. The jury has nothing to do with

² Rumsey v. New York & Pennsylvania R. R., 203 Pa. 579 (1902.)

³ Hampe v. Pittsburgh & Birmingham Traction Co., 165 Pa. 468 (1895); 25 Pitts. 413 (1895.)

⁴ Wolf v. Pennsylvania R. R., et al., 195 Pa. 91 (1900.)

carrying out the purpose of the connection, it cannot transfer from one of the roads to the other, whether with or without compensation, lands, right of way, station, yards, water, joint control or other valuable property or franchise.⁵

A railroad of the State of New Jersey, which leased a railroad belonging to a corporation of the State of Pennsylvania, has no power to execute a lease of the railroad in Pennsylvania, together with its own road to another corporation of the State of New Jersey whose railroad is not in any way connected with the railroad of the corporation of Pennsylvania. In such a case the law of Pennsylvania controls, and the lease is invalid under the Acts of April 23, 1861, P. L. 140, and February 17, 1870, P. L. 31, which require that the roads of the lessor and lessee shall be connected either directly or by an intervening railroad.⁶

Covenants by Lessor.

269. Where a railroad company leases another railroad for nine hundred and ninety-nine years, and covenants to keep it in good order and condition, and use all proper and reasonable means to maintain and increase its business, and thereafter the lessor becomes practically the owner of another railroad having the same general direction as the leased road with practically the same termini, the lessor does not violate its covenant with the lessee by shipping large amounts of freight over its own road when the carrying of such freight over the leased road would have been impracticable, on account of the latter's heavy grade, curvatures and ancient method of construction.⁷

Liabilities of Lessor.

270. If a railroad company has legislative authority to lease its road to another, a lease made in pursuance thereof, exempts the lessor from liability for negligence in the opera-

5 *Altoona & Philipsburg Connecting R. R. v. Beech Creek R. R.*, 177 Pa. 443 (1896.)

6 *Van Steuben v. Central R. R. of New Jersey*, 178 Pa. 367 (1896.)

7 *Catawissa R. R. v. Phila. & Reading R. R.*, 168 Pa. 544 (1895); affirming 3 Dist. 111 (1894.)

tion of the road by the lessee, if no control is reserved to the lessor.⁸

Liabilities of Lessee.

271. Where the lessee in a railroad lease covenants to pay rental and also to build certain connecting railroads, without naming any time within which they are to be built, although the understanding of the parties was that they were to be constructed within a year or more from the date of the lease, and the lessee fails to pay the rent or to build the connections, a court of equity will not decree a forfeiture of the lease, but will fix a reasonable time within which the rent must be paid, and the connections built, or the property surrendered to the lessor.⁹

Where a railroad company leases the property and franchises of another railroad company, and covenants in the lease to pay operating expenses and to apply the surplus of earnings, if sufficient for that purpose, to the payment of the coupons for interest on the underlying first mortgage bonds of the lessor company previously issued, the holder of such coupons has no right of action against the lessee to recover the amounts of the coupons.¹⁰

A lessee of a railroad is not liable for an injury to land caused by the original construction of a railroad bridge, and not by the operation of the railroad over it.¹¹

Where the owners of land upon which a narrow gauge railroad had been built, lease the land with the proviso that the lessee will not interfere with the present coal railroad, the lessees have no right to replace the narrow gauge railroad by a standard gauge railroad, neither have they any standing in a court of equity for a decree declaring their use of the strip exclusive on the mere averment that the coal has been ex-

8 *Scziwak v. Phila. & Reading R. R. and Lehigh Valley R. R.*, 4 Dist. 339 (1895.)

9 *Pittsburg, Johnstown, Ebensburg & Eastern R. R. v. Altoona & Beech Creek R. R.*, 196 Pa. 452 (1900.)

10 *Freeman v. Pennsylvania R. R.*, 173 Pa. 274 (1896); affirming 3 Dist. 733 (1894); 16 Pa. C. C. R. 346 (1894.)

11 *Kearney v. Central R. R. Co. of New Jersey*, 167 Pa. 362 (1895.)

hausted, without any proof that the lessors had abandoned the right reserved.¹²

Where one railroad company leases the property and franchises of another railroad company and the lessee covenants "to pay all taxes now or hereafter imposed by law upon the property demised, and the earnings from or business thereof," and the lease specially describes the property demised, but fails to mention the lessor's capital stock, the State tax thereon must be paid by the lessor. In such case this construction of the lease is of importance in reaching a result when such a construction has been accepted by the parties themselves for a period of thirty years.¹³

A covenant by a lessee "to pay all taxes now or hereafter imposed by law upon the property hereby demised and the earnings from or business thereof," cannot be construed to cover the shares of the capital stock of the lessor company, or the property or franchises upon which the valuation was made for purposes of taxation after the lease.¹⁴

Where one railroad leases the property and franchises of another, and the corporate identity of the lessor company is maintained, the lessee may exercise the statutory powers of the lessor, although the exercise of them inures partly to the advantage of the lessee.¹⁵

Arbitration Clause.

272. An arbitration clause in a railroad lease, providing for the selection of referees, is not rendered illegal by the fact that the lessee is the owner of a majority of stock of the lessor company.¹⁶

¹² *Phillips v. Pittsburg, Virginia & Charleston Ry. Co.*, 189 Pa. 309 (1899.)

¹³ *Erie & Pittsburg R. R. v. Pennsylvania R. R.*, 11 Dist. 254 (1902); 26 Pa. C. C. R. 641 (1902.)

¹⁴ *Erie & Pittsburgh R. R. Co. v. Penna. R. R.*, 208 Pa. 506 (1904.)

¹⁵ *Glaser v. Glenwood R. R. Co.*, 208 Pa. 328 (1904.)

¹⁶ *Wolf v. Pennsylvania R. R. et al.*, 195 Pa. 91 (1900.)

Distress.

273. A railroad company which has leased its road to another railroad company cannot collect the rental by distress.¹⁷

Forfeiture.

274. A court of equity will not declare a railroad lease null and void as between the parties to it, on the ground of ultra vires, after the lease has been executed and the lessor has enjoyed some of the benefits of it.¹⁸

Where a decree of forfeiture of a railroad lease entered because of failure to perform a covenant to build certain miles of railroad has been modified by the Supreme Court so as to extend the time for the performance of the covenant, a writ of assistance should not be granted to the lessor before the expiration of the extended time, but a decree granting such a writ will not be reversed where at the time it was issued only five days remained in which to build fifty or sixty miles of railroad.¹⁹

On an application for a writ of assistance to place a lessor in possession of leased property after a decree of forfeiture of the lease, the court will consider as finally adjudicated all questions relating to the right of forfeiture as finally adjudicated in the former proceedings.²⁰

Street Railways.

275. Street railways may be consolidated under the Railroad Act of May 16, 1861, and the Act of 1889, as to street railways does not affect their manner of consolidation under the Act of 1861.²¹

A street railway is included within the term "railroads," used

17 *Pittsburg, Johnstown, Ebensburg & Eastern R. R. v. Altoona & Beech Creek R. R.*, 196 Pa. 452 (1900.)

18 *Pittsburg, Johnstown, Ebensburg & Eastern R. R. v. Altoona & Beech Creek R. R.*, 196 Pa. 452 (1900.)

19 *Pittsburg, Johnstown, Ebensburg & Eastern R. R. v. Altoona & Beech Creek R. R.*, 203 Pa. 108 (1902); see s. c. 196 Pa. 452 (1900.)

20 *Pittsburg, Johnstown, Ebensburg & Eastern R. R. v. Altoona & Beech Creek R. R.*, 203 Pa. 108 (1902); see s. c. 196 Pa. 452 (1900.)

21 *Robinson v. Wilkesburg & East Pittsburgh Str. Ry.*, 32 Pitts. 369 (1902.)

in the Act of May 16, 1861, P. L. 702, and a merger and consolidation of street railways under that Act is lawful and not in conflict with the Act of May 15, 1895.²²

The provisions of the Acts of February 17, 1870, March 22, 1887, and May 15, 1895, authorizing leases by street passenger railway companies, are comprehensive enough to include all such companies, without regard to the motor power or means of propulsion used by them. Unanimous consent is not requisite to a valid lease of a railway company. Unless the charter provides otherwise, the votes of a majority of the shares is all that is required.²³

A traction company, incorporated under the Act of March 22, 1887, may lease other railway lines and operate its cars over such leased lines, at least so far as they are constructed within borough limits.²⁴

Where a street railway company incorporated prior to the Constitution of 1874, leases its property without legislative authority to a company organized under general acts, a borough whose consent to the use of its streets by the railway company was not required by the Act has no standing to object to the lease. The Commonwealth is the only party authorized to inquire whether railroad corporations have violated their charter rights.²⁵

The title of the Act of March 22, 1887, P. L. 9, is broad enough to cover the power conferred by clause 8, Sec. 1 of the Act authorizing motor companies "to lease the property and franchises of passenger railways which they may desire to operate and to operate said railways," and under said clause street railway companies have the implied power to lease motor power companies.²⁶

²² *Pennsylvania R. R. v. Inland Trac. Co. and Phila. & Lehigh Valley Trac. Co.*, 18 Montg. 130 (1902.)

²³ *O'Neill v. Hestonville, Mantua & Fairmount Pass. Ry.*, 9 Dist. 2 (1899.)

²⁴ *Conshohocken Borough v. Conshohocken Ry.*, 206 Pa. 75 (1903); affirming 18 Montg. 95 (1901.)

²⁵ *Minersville Borough v. Schuylkill Electric Ry. and Pottsville Union Traction Co.*, 26 Pa. C. C. R. 101 (1902); 11 Dist. 539 (1902.)

²⁶ *Pinkerton v. Pennsylvania Trac. Co. and Columbia & Donegal Elec. Ry. Co.*, 193 Pa. 229 (1899); affirming 16 Lanc. 117 (1899.)

Where a street railway company which has municipal consent to the use of streets, leases its road to a traction company, the latter succeeds to the rights of the former to operate its lines so far as they are within borough limits.²⁷

Where a street railway company, incorporated under special act of assembly, has the right to lay its tracks in a borough without municipal consent, the borough has no standing to object that the company exceeded its power by entering into an agreement for the use of or lease of its tracks; such a question can only be raised by the commonwealth.²⁸

Where one street railway company leases the right to use its tracks to another company and the latter company extends its lines into other territory, the first company is entitled to compensation as if they had agreed to the increased use for a reasonable consideration and the court will fix the amount.²⁹

A company which owns all the stock of a second street railway company and has a lease of all its property and franchises for 999 years, and an assignment of such lease, is an "assign" of the second company within the meaning of an agreement providing that the terms thereof shall "be binding upon the parties hereto, their successors or assigns."³⁰

A street railway company, all of whose stock, except five shares is owned by another company, and all of whose property is leased to such other company for 999 years, is not entitled to an injunction to prevent an illegal use of its tracks by a third street railway company after a delay of fourteen years.³¹

Where a street railway company licenses a second railway company or its assign to use its tracks, under an agreement which provides that the second company shall pay one-half the cost of construction of the portion of the road used, the

²⁷ *Conshohocken Borough v. Conshohocken Ry.*, 206 Pa. 75 (1903); affirming 18 Montg. 95 (1901.)

²⁸ *Minersville Borough v. Schuylkill Elec. Ry.*, 205 Pa. 402 (1903); affirming 26 Pa. C. C. R. 101 (1902); 11 Dist. 539 (1902.)

²⁹ *South Side Pass. Ry. v. Second Avenue Pass. Ry.*, 32 Pitts. 103 (1901.)

³⁰ *South Side Pass. Ry. v. Second Avenue Pass. Ry.*, 191 Pa. 492 (1899); 29 Pitts. 435 (1899.)

³¹ *South Side Pass. Ry. v. Second Avenue Pass. Ry.*, 191 Pa. 492 (1899); 29 Pitts. 435 (1899.)

second company may use the tracks for its own natural increase, but not for increase arising from the leasing of a large number of other lines.³²

Where a street railway company whose charter authorizes it to build switches and turnouts on the streets, leases its road and franchises to another corporation, the lessee has the rights of the lessor under the charter, and under any contract between the lessor and a municipality in pursuance of the charter.³³

Where a lease of one railway to another is authorized by law, there is no further liability of the lessor for negligence of the lessee in the operation of the road.³⁴

A regularly incorporated electric railway company, whose road was leased and operated by a traction company is not liable to a passenger for personal injuries resulting from the negligence of the traction company (lessee), although the latter failed to record its certificate, as required by the Act of March 22, 1887. The failure of the traction company to record its certificate of incorporation cannot be taken advantage of to impeach the charter collaterally.³⁵

A turnpike company which had authority to operate a passenger railway company cannot, in the absence of legislative authority, exempt itself from liability for the negligent operation of the railway by making a lease with another company to run its road.³⁶

A traction company, organized under the Act of March 22, 1887, is not restricted by the terms of the Act to the leasing of passenger railways which are situated in cities and boroughs exclusively, but has power to lease passenger railways wherever situated.³⁷

32 *South Side Pass. Ry. v. Second Avenue Pass. Ry. Co.*, 191 Pa. 492 (1899); 29 Pitts. 435 (1899.)

33 *Wilkes-Barre v. Coalville Pass. R. R. Co. and Wilkes-Barre & Wyoming Valley Trac. Co.*, 8 Kulp 298 (1896.)

34 *Pinkerton v. Pennsylvania Traction Co. and Columbia & Donegal Elec. Ry.*, 193 Pa. 229 (1899); affirming 16 Lanc. 117 (1899.)

35 *Pinkerton v. Pennsylvania Traction Co. and Columbia & Donegal Elec. Ry.*, 193 Pa. 229 (1899); affirming 16 Lanc. 117 (1899.)

36 *Hanlon v. Philadelphia & West Chester Turnpike Road Co.*, 182 Pa. 115 (1897); 28 Pitts. 97 (1897.)

37 *Philadelphia & West Chester Turnpike Co. v. Philadelphia & Del. County R. R.*, 5 Dist. 305 (1896); 6 Del. 357 (1896.)

CHAPTER XLIII.

ACTIONS AGAINST RAILROAD COMPANIES.

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| 276. Service of Process. | 281. Suits by Stockholders. |
| 277. Service Outside the County. | 282. Amendment. |
| 278. Foreign Corporations. | 283. Jurisdiction. |
| 279. Where Company is in Hands of Receiver. | 284. Change of Venue. |
| 280. Rights of Stockholders to Inspect Books. | 285. Execution. |

Service of Process.

276. The real estate officer of a railroad company is not an officer upon whom service of summons can be made.

The return of the Sheriff was as follows: "I hereby certify and return that being unable to find the president, secretary or directors of the Lehigh Coal and Navigation Company, defendant in this writ, I caused service to be made on George Ruddle, agent of real estate of said defendant, the Lehigh Coal and Navigation Company, at the office of said company, at the borough of Mauch Chunk, Carbon County, Pa., a true and attested copy of the within writ and making known to him the contents thereof." It was held that the service would be set aside.¹

Service of process on the president of a corporation while in attendance at court as a suitor and witness on behalf of the corporation will be set aside.²

Under the Act of March 17, 1856, relating to service of process upon corporations, the word "manager" is equivalent to "director." Service upon an employee acting as superintendent and styled manager is insufficient.³

¹ *Stark v. Lehigh Coal & Navigation Co.*, 9 Kulp 467 (1899); 8 Dist. 720 (1899.)

² *Western New York & Pennsylvania R. R. v. Clermont & Marvin Creek R. R.*, 9 Dist. 299 (1900.)

³ *Johnson v. Carbon County Electric Ry.*, 18 Pa. C. C. R. 479 (1895.)

Service Outside the County.

277. Service of process upon the president of a company outside the county in which its corporate property is situated is not sufficient service and will be set aside.⁴

Although the entire roadbed of a street railway company may be in one county, where it also maintains its principal office for the meeting of its stockholders and the transaction of other business, yet suit in trespass may be maintained in another county for a cause of action arising in the first county, and a good service may be made upon the president at his residence in the second county, where it appears that both the president and secretary of the company reside in the second county and that the company maintains in the second county an office occupied by the secretary and the company's type-writer, where much of the correspondence is carried on; where the board of directors meet; where the corporate seal is part of the year kept and affixed to the corporate documents; where part of its banking business is transacted; where its stock certificates are attested and issued; and where the company's ledger is kept and much other business transacted.⁵

Return of service was as follows: "Served the Delaware County and Philadelphia Electric Railway Company by giving Nov. 16, 1896, a true and attested copy of the within writ to James Austin, President of said company, and making known to him the contents thereof." The writ was served outside of the county where the corporate property was situated. It was held that the service was insufficient, as the action must be brought in the county where the corporate property is in whole or in part situated.⁶

Service upon a domestic corporation by serving the traveling freight agent at his office, which is outside the county where the trespass occurred or its corporate property situated, is invalid.⁷

4 *Edelstein v. Delaware County & Philadelphia Electric Ry. Co.*, 19 Pa. C. C. R. 95 (1896); 6 Dist. 72 (1896.)

5 *Jensen v. Philadelphia, Morton & Swarthmore St. Ry.*, 201 Pa. 603 (1902.)

6 *Edelstein v. Delaware County & Philadelphia Elec. Ry.*, 6 Dist. 72 (1896); 19 Pa. C. C. R. 95 (1896.)

7 *Zablocki v. Delaware, Lackawanna & Western R. R.*, 10 Dist. 54 (1901.)

Service of summons was made upon the secretary of a street passenger railway company while he was visiting in a county outside of the county where the corporation did business but within the county where the contract upon which the suit was based was made. It was held to be a valid service.⁸

An action for damages against a railroad company must be instituted in the county where all or a portion of the property of the company is situated. Thus an action cannot be maintained against a railroad company in a county where it has no property by service on the treasurer of the company in the county where the suit was begun.⁹

The sheriff may serve a member of the board of directors of a railroad company where the company has no office or place of business in the county where the cause of action arose. Where the accident occurred in Philadelphia and the action for negligence is brought in Montgomery County, service upon a director in Montgomery County will be set aside.¹⁰

Foreign Corporations.

278. The return of service by the Sheriff was as follows: "Served the Chesapeake and Ohio Railway Company, a non-resident corporation, but engaged in business in this county, by giving, December 27, 1900, a true and attested copy of the within writ to James Harris, agent of the said company, No. 31 South Third street, the usual place of business of said agent, and making known to him the contents thereof."

Harris, upon whom service of the writ was made, was a freight solicitor in Philadelphia, whose only business was to solicit freight and issue bills of lading therefor to move over defendants' line of railway wholly outside the State. It was held that the service was insufficient.

The Acts of March 21, 1849, April 8, 1851, and April 21, 1858, providing for service of writs on agents of foreign corporations, contemplate only such corporations as are engaged in business in this State. The mere maintenance in Phila-

8 *Dick & Whitla v. Meadville Str. Ry. Co.*, 7 Dist. 350 (1898); 28 Pitts. 439 (1898.)

9 *Bailey v. Williamsport & North Branch R. R.*, 174 Pa. 114 (1896.)

10 *O'Neill v. Philadelphia Rapid Transit Co.*, 19 Montg. 180 (1903.)

delphia of a freight solicitor to engage freight to move in other States, and issue bills of lading therefor, without authority to collect the moneys for such carriage, is not engaging in business in this State.¹¹

Where a citizen of Allegheny County, Pa., who was injured in that county, where all the witnesses resided, brings suit for damages for personal injuries in an Ohio court against a corporation chartered and operated in both States, which could have been served in this State, and any judgment obtained, enforced here as well as in Ohio, comity will not be given at the expense of injustice to the citizens of the State to which the appeal is made, to aid the plaintiff in procuring depositions for use upon the trial of the case in Ohio, in accordance with the Act of April 8, 1883, Sec. 18, P. L. 308.¹²

Where Company is in Hands of Receiver.

279. Where service of summons was made upon a foreign corporation at a point within the State by leaving a certified copy of the writ with an agent of the defendant railroad company in the office attached to the depot, such service is sufficient even although at the time of service of the summons the company was in the hands of receivers.¹³

Rights of Stockholders to Inspect Books.

280. A stockholder who is denied access to corporate records and information as to corporate affairs, in the absence of denial, and upon allegation of fraudulent collusion and of his intention to file a bill to correct the alleged wrong, is entitled to an inspection of the books and papers of the corporation, his application to inspect them having been refused.¹⁴

A writ of peremptory mandamus on the officers of a railroad company will be issued commanding them to permit the petitioners or their duly authorized agents to inspect the stock ledger list or list of stockholders and make copies thereof,

11 *Sheetz v. Chesapeake & Ohio Ry.*, 25 Pa. C. C. R. 177 (1901.)

12 *Doubt v. Pittsburgh & Lake Erie R. R.*, 19 Pa. C. C. R. 178 (1897); 6 Dist. 238 (1897.)

13 *Hill v. Baltimore & Ohio R. R.*, 7 Dist. 473 (1897.)

14 *Com. ex rel. v. Pennsylvania R. R.*, 6 Dist. 266 (1897.)

where the purpose of the petitioners is to enable them to consult with and obtain proxies from other stockholders to be used at a coming election of directors. In such a proceeding it is unnecessary to make the receivers parties to the proceedings, as they have nothing to do with the stock and internal management of the company.¹⁵

Suits by Stockholders.

281. In *Wolf v. Pennsylvania R. R. et al.*, Mr. Justice Mitchell in discussing the right of a stockholder to enforce a corporate right after refusal of the corporation to act said: "The right of an individual stockholder to act for the corporation is exceptional and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a non-performance, of a manifest official obligation, amounting to a breach of trust. Beach on Private Corporations, Sec. 878. There must be averred and proved an actual application to the directors and a refusal by them to bring suit or to allow plaintiff to do so in the corporate name and where misconduct of the directors themselves is alleged the bill must show an effort to secure plaintiff's rights through meetings of the corporation: Beach, Secs. 882, 885. 'The shareholder should set forth in his bill the efforts that he has made to induce the corporation to act in the matter, should allege its refusal or failure to sue,' and 'facts showing that he has left undone nothing which in reason he might have done to prevail on the corporate management to bring the action;' Taylor on Corporations, Secs. 138, 140. See also Morawetz on Corporations, Secs. 241, 244.

"The authorities are agreed that if it sufficiently appears that a demand would be useless, it need not be made: Beach, Sec. 886. A mere averment that as the lessee owned a majority of stock of the lessor and elected its officers, who allowed themselves to be 'kept in absolute ignorance of its business,' is

15 *Com. v. Philadelphia & Reading R. R.*, 3 Dist. 115 (1893.)

insufficient, neither is it sufficient to excuse a demand from an inference that by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust."¹⁶

Where a stockholder of a railroad company, which is controlled by another company, files a bill for an account, there being nothing in the bill to indicate that the presidents of the respective companies have any such interest as would properly make them parties, they should not be made parties to the suit.

Such a bill is demurrable if the stockholder fails to state when he acquired the stock upon which his right to an accounting depends.¹⁷

Amendment.

282. Where suit was brought against the "Pennsylvania Railroad Company, operating the Allegheny Valley Railroad," and service was accepted by counsel for the Pennsylvania Railroad Company, an amendment will be allowed whereby the words "Pennsylvania Railroad Company operating" were stricken out and "company" inserted after Allegheny Valley Railroad, upon the ground that the Pennsylvania Railroad was not operating the road at that time.¹⁸

Jurisdiction.

283. After the defendant has gone to trial on the general issue, in an action for damages to real estate, he will not be permitted to question the jurisdiction of the court, because the property injured is located in another county, where under the plaintiff's statement he might have raised the objection before trial.¹⁹

Change of Venue.

284. The Act of April 14, 1834, P. L. 395, relating to change of venue in cases brought by and against canal and

¹⁶ 195 Pa. 91 (1900.)

¹⁷ Wolf v. Shortridge, 22 Pa. C. C. R. 81 (1898); 8 Dist. 1 (1898.)

¹⁸ McBride v. Pennsylvania R. R., 32 Pitts. 224 (1902.)

¹⁹ Magee v. Pennsylvania Schuylkill Valley R. R., 13 Super. Ct. 187 (1900.)

railroad companies is repealed by the Act of March 30, 1875, P. L. 35, "relating to and authorizing change of venue in civil cases."²⁰

Execution.

285. Under the Act of April 7, 1870, before the property and franchises of a corporation may be sold by special fi. fa. demand must be made at the principal office of the company as provided by the Act of June 16, 1836, and the sheriff of the county in which the writ issues in order to make demand may go to any county within the Commonwealth where the principal office is situated.²¹

²⁰ *Felts v. Delaware, Lackawanna & Western R. R.*, 170 Pa. 432 (1895.)

²¹ *Smith v. Altoona & Philipsburg Connecting R. R.*, 182 Pa. 139 (1897.)

CHAPTER XLIV.

RECEIVERS.

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| 286. Appointment. | 289. Receiver's Sale. |
| 287. Actions Against Receivers. | 290. Receivers' Certificates. |
| 288. Actions by Receivers. | |

Appointment.

286. Upon a petition for a receiver upon the ground of insolvency and mismanagement, the petitioner must show an undoubted right in immediate danger from abuse of the power exercised by the defendants.¹

Actions Against Receivers.

287. If a railroad company and its receivers are jointly sued by a passenger for injuries sustained while the road is being operated by the receivers, and the railroad company has not been served and does not appear, a judgment cannot be entered against the railroad company on a verdict in favor of the plaintiff.²

Under the third section of the Act of Congress of March 3, 1887, 24 Stat. at L. 552, ch. 373, receivers appointed by any court of the United States may be sued in the State courts in respect to any transaction connected with the property held by them without previous leave of the court in which such receiver was appointed.³

Actions by Receivers.

288. In a suit on a surety bond, given to plaintiff, a receiver of a railroad, his successors and assigns. to recover for the use

¹ *Gracey v. Pittsburg Trolley Co.*, 27 Pitts. 109 (1897.)

² *Ault v. Cowan*, 20 Super. Ct. 628 (1902.)

³ *Hill v. Baltimore & Ohio R. R.*, 7 Dist. 473 (1897.)

of certain locomotives, it is no defence to set up a sale of the locomotives by the receiver as working a release of the surety.⁴

Receiver's Sale.

289. In Pennsylvania, under the Acts of April 11, 1862, and March 23, 1877, equity has jurisdiction of the foreclosure of railroad mortgages, hence in receivers' sales, the equity rule that liens are not barred unless the holder has notice, prevails.

Liens upon property held by a receiver are not divested by virtue of sale made by him. If the order of sale makes no mention of prior liens, the sale passes the title in the property as it is in the receiver, subject to any existing incumbrances.⁵

Receiver's Certificates.

290. The courts will authorize the issuance of receivers' certificates for the completion of an unfinished railroad, where such action is requested by the holders of ninety-six per cent. of the bonds, and the non-consenting bondholders are protected in their priority of lien.⁶

⁴ *Monsarratt v. Equitable Trust Co.*, 14 Super. Ct. 541 (1900); affirming 30 Pitts. 305 (1900.)

⁵ *Fidelity Title & Trust Co. v. Schenley Park & Highlands Ry.*, 189 Pa. 363 (1899); 29 Pitts. 371 (1899.)

⁶ In *Rutherford v. Pennsylvania Midland R. R.*, 178 Pa. 38 (1896), Chief Justice Sterrett said: "As to the equitable power of the court to appoint a receiver of an insolvent railroad company when a proper case is presented, there cannot be any doubt. Such appointments as already intimated, rest in the sound discretion of the court, exercised with a view to the interests—both public and private—that may be involved. This is also true in the main, as to the power of the court to authorize its receiver to raise money necessary for the preservation and completion of a railroad, and to make the same chargeable as a lien thereon. Whether as a general rule the power to order receiver's certificates for the completion of a railroad, and make them a lien prior to existing bonds, should not be limited to 'going concerns may be regarded as an open question; but, in view of the fact that the decree in this case was made upon the request of a very large majority of the bondholders, and those who did not join in the request are sufficiently protected by the form of the decree, it is unnecessary in this case to further consider the subject. The ground upon which courts act in all such cases is the enhancement of the security of the bondholders. When it appears that the holders of over ninety-six per cent. of the bonds assented to the decree, it is fair to assume that the security of the bonds, as a class, is not likely to be impaired thereby.'"

Creditors of a railroad company who furnished material and labor more than six months prior to the appointment of a receiver have no standing to object to the issuance of receivers' certificates for the payment of claims for material and labor which accrued within six months prior to the receivership.⁷

Where it is for the best interests of the bondholders and creditors of a street railway company, the court will order the issuance of receivers' certificates, to enable the receiver to place the road and the equipment of the company in good condition, and will further order that the expenditures to be made by the receiver, and the conduct of the business of the company shall be entrusted to a competent superintendent.

In such a case the receiver will not be surcharged with a small amount slightly in excess of the amount authorized where the additional expenditure was a great advantage to the property.⁸

7 *Rutherford v. Pennsylvania Midland R. R.*, 178 Pa. 38 (1896.)

8 *Bucks County Railway Co.'s Receivership*, 22 Pa. C. C. R. 170 (1899); *Bucks County Railway Co.'s Case*, 22 Pa. C. C. R. 357 (1899.)

CHAPTER XLV.

FORFEITURE AND ABANDONMENT.

291. Abandonment of Charter.

293. Forfeiture of Charter.

292. Collateral Attack on Charter.

294. Street Railways.

Abandonment of Charter.

291. The Act of March 21, 1871, P. L. 231, providing "that whenever any turnpike, plank road, canal or slack water navigation or public highway of any company or corporation has been or shall have been for the period of five successive years or upwards, decayed, out of repair, and unused for the purpose mentioned in the charter of said company, the same shall be deemed and held to be abandoned," does not apply to railroad companies.¹

Where a street railway company, incorporated under the Act of 1878 (afterward declared unconstitutional) subsequently accepted the provisions of the Act of 1889 and was re-chartered, had authority under its charter to construct its road on certain avenues, afterward leased the railway of a rival company, which had without opposition from the former company, constructed its railway upon streets which might have been appropriated by the former company, such action of the former company ratified by the sanction of the lease, works an abandonment of the rights originally conferred and it and its successors will be enjoined at the instance of property owners whose property would be more or less affected from doing any acts which they had the power to do before the abandonment.²

If a railroad company which acquired its right of way under a lease, the terms of which provided that "if the railroad company shall cease to operate or use said railroad its rights here-

¹ *Pittsburgh, Virginia & Charleston Ry. v. Pittsburgh, Canonsburgh & State Line R. R.*, 159 Pa. 331 (1893.)

² *Babcock v. Scranton Trac. Co.*, 1 Lacka. 223 (1895.)

under shall end," allows a portion of the road to fall into decay and ceased for a number of years to operate its road, the action of the railroad constitutes an abandonment and an injunction will not lie to prevent the owner in fee of the land over which the railroad ran from removing the rails, etc., of said railroad, notice to remove the same having been given to the railroad, which it refused to comply with.³

A turnpike company, which is authorized to purchase the property and franchises of a passenger railway company, and is invested with the powers and privileges of the railroad company, but with authority to remove the tracks, may, twenty-seven years after it has removed the tracks, rebuild and operate the railroad. The removal of the tracks in such a case, raises no implication of abandonment or other disability as to the future exercise of the franchises of the railroad company.⁴

Collateral Attack on Charter.

292. The charter of a street railway company cannot be attacked collaterally. Such a proceeding should be at the suit of the State.⁵

Upon a bill by a railroad company to restrain another railroad from building an overhead crossing over its road, the question of forfeiture of a charter power by failure of the former to complete its line with the five year limitary period provided by Sec. 5 of the Act of April 4, 1868, cannot be raised. Such a question cannot be raised in a collateral proceeding at the instance of a private suitor, but only in a direct proceeding (quo warranto) by the Commonwealth.⁶

Although a turnpike company, which has power under its charter to construct and operate a street railway upon its road-

3 Spring Brook Ry. v. Spring Brook Water Supply Co., 3 Lacka. 90 (1897.)

4 Hinchman v. Philadelphia & West Chester Turnpike Road, 160 Pa. 150 (1894.)

5 Union Street Ry Co. v. Hazleton & North Side Elec. Ry., 15 Pa. C. C. R. 271 (1894); 3 Dist. 785 (1894); 6 Del. 22 (1894); Hinchman v. Philadelphia & West Chester Turnpike Road, 160 Pa. 150 (1894.)

6 Pittsburgh & Castle Shannon R. R. v. West Side Belt R. R., 33 Pitta. 11 (1902.)

bed, neglects to exercise its right for a long period of time, its franchise cannot be attacked collaterally.

A turnpike company, incorporated under the Act of April 5, 1853, had power under its charter to construct a railway upon its roadbed. It, however, never exercised its right, and in 1897 the petitioner was incorporated, under the Act of 1889, with power to construct and operate a street railway over a portion of the turnpike company's road. Not being able to agree upon the damages, appellant filed a petition to have viewers appointed, whereupon the turnpike company moved to quash the proceedings on the ground that appellant had no legal ground to lay a street railway on the turnpike. Appellant, on the other hand, contended that the turnpike company did not possess the lawful authority to lay a street railway on its turnpike road, because (1) it lost its franchise to do so by the operation of the first section of Article 16 of the State Constitution, and (2) by laches in not exercising its franchise for thirty-eight years. The court held that the question of the forfeiture of the turnpike company's charter could not be attacked by a private corporation, but only in a collateral proceeding instituted by the Commonwealth. Green, J., said: "The right claimed by the turnpike company is a corporate franchise which has been granted by the Commonwealth. Whether it has forfeited, by non-exercise, is a question between the Commonwealth and her grantee. If the Commonwealth does not choose to exercise her right to assert the forfeiture, the decisions do not confer that right upon a private litigant. The appellant is such a litigant, claiming a result only for its private advantage."⁷

A railroad company has no standing to raise a question as to the abandonment or forfeiture of another railroad company's location. Such a question is for the State alone.⁸

Where a right to lay tracks on a turnpike road was granted to an electric railway company, and it is alleged to have been

⁷ Philadelphia & Merion Railway Company's Petition, 187 Pa. 123 (1898.)

⁸ Pittsburgh, Virginia & Charleston R. R. Co. v. Pittsburgh, Canonsburg & State Line R. R., 159 Pa. 331 (1893.)

lost by laches, the Commonwealth alone can move for a forfeiture.⁹

Forfeiture of Charter.

293. A railroad company, organized under the Act of April 4, 1869, which attempts to construct an elevated street passenger railway in the streets of a city may have its franchises forfeited by quo warranto proceedings.¹⁰

The ownership by a railroad company of the capital stock of a corporation authorized by its charter, to conduct the business of mining coal, iron ore, etc., is not prosecuting or engaging in the mining industry within the meaning of Sec. 5, Article 17 of the Constitution.¹¹

Street Railways.

294. The failure of a street railway company to complete the construction of its railway within the two years limited by the Act of May 14, 1889, works a forfeiture of its franchise, and this is so although the company was restrained from completing its railway by injunction on account of failure to secure the consent of the abutting property owners.¹²

Where a turnpike company which had the right to lay and maintain passenger railway tracks on its turnpike, released to a municipality all the interest of the company in that portion of its turnpike occupying the bed of a street, as laid down within the limits of the municipality the right to lay and maintain passenger railway tracks within the bed of the street is extinguished and the city may subsequently grant to a street railway company organized for the purpose of operating a passenger railway an exclusive right to the use of said street.¹³

9 *Turnpike Co. v. Jenkintown Elec. Ry.*, 4 Dist. 8 (1894.)

10 *Com. ex rel. v. Northeastern Elevated Ry. Co.*, 161 Pa. 409 (1894); reversing 3 Dist. 104 (1893.)

11 *Hartwell v. Buffalo, Rochester & Pittsburg Ry. Co.*, 19 Pa. C. C. R. 231 (1897); 6 Dist. 212 (1897.)

12 *Com. ex rel. v. Middletown Elec. Ry. Co.*, 2 Dauph. 316 (1899); 6 Lacka. 81 (1899); 23 Pa. C. C. R. 262 (1899.)

13 *West Philadelphia Pass. Ry. v. Philadelphia & West Chester Turnpike Road Co.*, 186 Pa. 459 (1898); affirming 19 Pa. C. C. R. 225 (1897); 6 Dist. 160 (1897.)

A turnpike company whose right of way extended within the limits of a city became the purchaser of the franchises of a passenger railway company which had been authorized to lay a track along the road of the turnpike. It subsequently released to the city of Philadelphia "all the interest of said company in that portion of their road occupying the bed of Market street within the limits of the city of Philadelphia." It was held that by such a grant the turnpike company gave up all their rights and franchises, and all their control and interests in the bed of Market street, which interest included not merely the right to maintain a turnpike or plank road, but also a right to lay and maintain railway tracks.¹⁴

¹⁴ *West Philadelphia Pass. Ry. v. Philadelphia & West Chester Turnpike Road Co.*, 186 Pa. 459 (1898); affirming 19 Pa. C. C. R. 225 (1897); 6 Dist. 160 (1897.)

CHAPTER XLVI.

TAXATION.

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| 295. Tax on Capital Stock and Dividends. | 300. Municipal Liens for Paving. |
| 296. Bonus on Increase of Capital Stock. | 301. License Tax on Street Cars. |
| 297. Tax on Gross Receipts. | 302. License Tax on Poles. |
| 298. Tax on Loans. | 303. When Railroad is in Hands of a Receiver. |
| 299. Property Exempt from Local Taxation. | |

Tax on Capital Stock and Dividends.

295. The tax upon the capital stock of a corporation is a tax upon the property, assets, and franchises of the corporation.¹

The Acts imposing a tax on the capital stock of certain corporations for State purposes require the stock to be appraised at its actual value in cash, "not less, however, than the average price which said stock sold for during said year." An "average price" ascertained by multiplying the number of shares sold at each sale by the price paid per share, adding together the amounts paid at all the sales and dividing this sum by the number of shares sold, was held to be a proper method for ascertaining the average price for the year.²

Under the Act of June 8, 1891, the question of the actual value in cash of the capital stock of a corporation is a question of fact to be determined by considering the value of defendant's tangible property and assets of every description, including its bonds, mortgages and moneys at interest and its fran-

¹ *Com. v. New York, Pennsylvania & Ohio R. R.*, 188 Pa. 169 (1898); *Erie & Pittsburgh R. R. v. Pennsylvania R. R.*, 26 Pa. C. C. R. 641 (1902); 11 Dist. 254 (1902.)

² *Com. v. Peoples Trac. Co.*, 183 Pa. 405 (1898); *Com. v. Union Trac. Co.*, 1 Dauph. 178 (1898.)

chises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined. The actual value of the stock of a corporation being a question of fact, an insolvent corporation has no standing to complain of discrimination in the methods of appraisement as between itself and solvent companies, so long as its stock is not assessed in excess of its actual value.³

Under the Act of June 8, 1891, the amount and rate per cent. of dividends made by a corporation, and the amount carried to the surplus or sinking fund during the tax year do not furnish an absolute measure of the actual value in cash of the capital stock of a corporation, but are to be considered with other relevant facts.⁴

Evidence that a portion of a railroad in the State could be duplicated at a certain price, is not relevant in determining the value of capital stock.⁵

A corporation is not entitled to any credit upon the tax assessed upon its capital stock, although it leases the properties of other corporations upon whose capital stock the tax has already been paid; but it is not liable for tax upon the portion of its capital stock, representing its ownership of shares of stock in other corporations which have been already taxed under Sec. 21 of the Act of June 8, 1891.⁶

The probable speedy exhaustion of coal fields in a region served by a railroad company is an element to be considered in

3 *Com. v. New York, Pennsylvania & Ohio R. R.*, 188 Pa. 169 (1898); *Com. v. Pine Creek Ry.*, 188 Pa. 198 (1898); *Com. v. Fall Brook Ry.*, 188 Pa. 199 (1898); *Com. v. Beech Creek R. R.*, 188 Pa. 203 (1898); *Com. v. Ontario, Carbondale & Scranton Ry.*, 188 Pa. 205 (1898); *Com. v. Jamestown & Franklin R. R.*, 6 Lacka. 234 (1900); 3 Dauph. 214 (1900); *Com. v. Shamokin, Sunbury & Lewisburg R. R.*, 3 Dauph. 168 (1900); *Com. v. Lake Shore & Michigan Southern R. R.*, 3 Dauph. 172 (1900); *Com. v. Delaware, Lackawanna & Western R. R.*, 3 Dauph. 266 (1894.)

4 *Com. v. Delaware, Susquehanna & Schuylkill R. R.*, 3 Dauph. 249 (1894); *Com. v. Jamestown & Franklin R. R.*, 3 Dauph. 255 (1893); *Com. v. Delaware, Lackawanna & Western R. R.*, 3 Dauph. 266 (1894.)

5 *Com. v. Lake Shore & Michigan Southern R. R.*, 3 Dauph. 172 (1900); 11 Dist. 318 (1900.)

6 *Com. v. Union Trac. Co.*, 1 Dauph. 178 (1898.)

determining the value of a railroad company's stock for purposes of taxation. Dean, J., said: "It is very clear that if in five or ten years, the freight on which the defendants' road depends for prosperity no longer exists, the actual value of its capital stock is seriously depreciated: for the value of its franchise privileges, and assets must be based not only on past but on future probable prosperity."⁷

Real estate situated outside this State and not connected with nor constituting a part of the railroad may be deducted from the total appraisement in order to determine the value of its capital stock in this State.⁸

Where a railroad company is formed by the consolidation of Pennsylvania and New York corporations, it is taxable in this State on its capital stock in the proportion of mileage in Pennsylvania to the mileage in New York. The whole length of the road being 100.07 miles and 85.70 miles being in Pennsylvania, that proportion of the whole capital stock is taxable in this State.⁹

The capital stock of a domestic railroad corporation represented by its equipment in use, interchangeably on its lines within and without the State is taxable, under Sec. 4, Act of June 7, 1879, P. L. 114 and Sec. 21, Act of June 1, 1889, P. L. 429, in the proportion its mileage operated in this State bears to its entire mileage. But the capital of such company invested in real estate and other railroads outside the State, and in vessels, barges, and tugs built, registered and used wholly outside the State is not subject to such taxation; as such property is already taxable in the State where it exists and is used.¹⁰

A covenant by a railroad lessee "to pay all taxes now or hereafter imposed by law upon the property hereby demised, and the earnings from or business thereof" of the lessor does not include the State tax on the capital stock of the lessor or

7 *Com. v. Fall Brook Ry.*, 188 Pa. 199 (1898.)

8 *Com. v. Lake Shore & Michigan Southern R. R.*, 3 Dauph. 172 (1900); 11 Dist. 318 (1900.)

9 *Com. v. Fall Brook Ry.*, 188 Pa. 199 (1898.)

10 *Com. v. Delaware, Lackawanna & Western R. R.*, 1 Dauph. 153 (1891); affirmed 145 Pa. 96 (1891); *Com. v. Lake Shore & Michigan Southern R. R.*, 3 Dauph. 172 (1900); 11 Dist. 318 (1900.)

on the property and franchises upon which the valuation of its shares is made for the purpose of taxation after the lease.¹¹

Where a street railway company is required by its charter to pay to a city a tax on "dividends declared," and the power to declare dividends is discretionary in the directors of the company, the tax can only be levied on dividends actually declared, but such dividends need not necessarily be in cash. Thus a street railway company leased its property and franchises to another street railway company under an arrangement by which the stockholders of the lessor transferred their stock to the lessee, and received eight shares of the lessee's stock for each share of their own. The lessor also transferred to the lessee the shares of a third street railway company and some real estate in consideration of the issue of additional shares of the lessee's stock to the stockholders of the lessor. It was held that the distribution of the value of the shares of the third company among the stockholders of the lessor was a dividend, and was taxable by the city.¹²

Three street railway companies agreed on a plan of consolidation. The first company's stock was worth per share five times as much as that of the second company, and ten times as much as that of the third company. To obtain a convenient divisor of the consolidated stock, the first company increased its shares, and the new stock was issued in proportion of ten shares for each one of the first company, two for each one of the second company, and one for each of the third company, thus preserving the proportionate value each to the other. It was held that the issue of the increased stock to the stockholders of the first company was not a dividend.¹³

A nominal or arithmetical increase of shares of stock without transferring to the stockholders anything out of the treasury or property of the corporation, and which is not a cover for distribution of accumulated profits, is not a dividend.¹⁴

¹¹ *Erie & Pittsburg R. R. Co. v. Pennsylvania R. R. Co.*, 12 Dist. 657 (1903.)

¹² *Allegheny City v. Pittsburgh, Allegheny & Manchester Pass. Ry.*, 179 Pa. 414 (1897); 27 Pitts. 241 (1897.)

¹³ *Allegheny City v. Federal St. & Pleasant Valley Pass. Ry. Co.*, 179 Pa. 424 (1897); 27 Pitts. 243 (1897.)

¹⁴ *Allegheny City v. Federal St. & Pleasant Valley Pass. Ry. Co.*, 179 Pa. 424 (1897); 27 Pitts. 243 (1897.)

Bonus on Increase of Capital Stock.

296. A railroad company organized under the Act of April 4, 1868, P. L. 62, may under the Act of June 4, 1883, P. L. 67, increase its capital stock to one hundred and fifty thousand dollars per mile without the payment of the bonus required by the Act of February 9, 1901. If several companies have this right under the Act of June 4, 1883, and are consolidated, the consolidated company has the right to increase its stock to one hundred and fifty thousand dollars per mile without the payment of the bonus.¹⁵

If the consolidated company is formed of a New York Company and a Pennsylvania company having the right under the Act of June 4, 1883, the consolidated company has the same right.^{15*}

Tax on Gross Receipts.

297. A railroad company engaged in transportation business, both within and without the State is liable for tax on gross receipts only upon the amount received for transportation between points, both of which are within the State.¹⁶

The Act of June 7, 1879, which imposes a tax on the gross receipts of transportation companies, is not valid in so far as such receipts are derived from commerce between points within and points without the State, but is valid as to commerce wholly confined within the limits of the State.¹⁷

Under the Act of June 7, 1879, a railroad company is taxable on its gross receipts from transportation of passengers and freight passing out of the State and in again in course of transit, but is not taxable on its receipts from transportation of passengers and freight passing from a point in another State, thence through this State to another point in the former State.¹⁸

15 *Commonwealth v. Buffalo & Susquehanna R. R.*, 207 Pa. 154 (1903.)

15* *Commonwealth v. Buffalo, Rochester & Pittsburgh Ry.*, 207 Pa. 160 (1903).

16 *Com. v. Buffalo, New York & Philadelphia R. R.*, 2 Dauph. 216 (1888.)

17 *Com. v. Delaware & Hudson Canal Co.*, 4 Dauph. 154 (1888); *Com. v. New York, Lake Erie, & Western R. R.*, 4 Dauph. 165 (1888.)

18 *Com. v. New York, Lake Erie & Western R. R.*, 4 Dauph. 165 (1888.)

If any part of a foreign corporation's gross receipts is taxable, the tax cannot be evaded by sending the money out of the State; the corporation is here for purposes of proper taxation, and it is not material where its funds are physically kept.¹⁹

Receipts of a railroad company derived from transportation of United States mail are not taxable under the Act of June 1, 1889.²⁰

The total gross receipts of an express company are taxable without deducting amounts paid to railroad companies for transportation of the business upon which such receipts were collected. Such tax is not double taxation within the constitutional prohibition, neither are such receipts paid to railroads exempt from taxation by the provisos in Sec. 7 of the Act of June 7, 1879, and Sec. 23 of the Act of June 1, 1889.²¹

Tax on Loans.

298. The four mills tax upon the indebtedness of a corporation under the Act of June 8, 1891, is not a general tax on all bonds, but only on such as are "issued to residents of this State and held by them," and the duty of the corporation is to use diligence to ascertain the residence of its bondholders and whether it has or has not done so is a question in each case to be determined by the facts and circumstances. There is no presumption that the bonds of corporations of this State are held by residents of the State. Accordingly where the treasurer of a corporation used care and diligence in ascertaining who the holders of bonds were and where they resided, and failed to find bonds amounting to \$327,000, which were afterwards discovered to have been held by domestic corporations during a tax year, it was held that no tax was to be imposed upon the company in respect of these bonds, as the failure to find them was not the fault of the treasurer, and the company cannot be held liable unless its officer has failed in duty.²²

Under the Act of June 30, 1885, a corporation which failed

19 *Com. v. Delaware & Hudson Canal Co.*, 4 Dauph. 154 (1888.)

20 *Com. v. Lehigh Valley R. R.*, 4 Dauph. 174 (1889); *Com. v. Delaware, Lackawanna & Western R. R.*, 4 Dauph. 192 (1888.)

21 *Com. v. United States Express Co.*, 4 Dauph. 312 (1893.)

22 *Com. v. Lehigh Valley R. R.*, 186 Pa. 235 (1898.)

to report or prove that any of its indebtedness is due to or any evidences of such indebtedness was held by non-residents is liable for tax upon the whole amount of its indebtedness.²³

The treasurer of a corporation in making a return for a tax on loans, must show affirmatively that he has exercised the utmost diligence in endeavoring to ascertain the residence of the holders of the loans, and if he fails to do so, and returns a large number of loans as being held by persons whose residence is unknown, the corporation will be liable for his negligence and will be charged with the tax.²⁴

The treasurer should detail the various steps taken by him to ascertain the residence of the holders of indebtedness, and whether he has made diligent inquiry is for the court, not for the officers to decide.²⁵

If the bonds of a corporation contain a stipulation for the payment of all taxes, the return of the treasurer will not relieve the corporation from liability. As long as such corporation's account is open, the Commonwealth may produce for taxation any bonds that the treasurer failed to find and may demand a tax thereon. Simonton, P. J., said: "The defendant has undertaken to discharge a difficult obligation of unknown extent. This contract may be enforced by the State or bondholder, for both are interested in its fulfillment; and either may show that the contract has not been discharged. When bonds are shown to be taxable, there is no answer except payment."²⁶

A full year's tax can not be recovered upon bonds which have been in existence for only a portion of the year for which a tax is charged.²⁷

Under the Act of June 30, 1885, a corporation is not liable for tax on its obligations, where no interest has matured or been paid during the tax year.²⁸

23 *Com. v. Thirteenth & Fifteenth Strts. Pass. Ry. Co.*, 2 Dauph. 391 (1890.)

24 *Com. v. Peoples Pass. Ry.*, 183 Pa. 353 (1898); *Com. v. Lehigh Valley R. R.*, 186 Pa. 235 (1898); *Com. v. Allentown Terminal R. R.*, 2 Dauph. 81 (1897.)

25 *Com. v. Allentown Terminal R. R.*, 2 Dauph. 81 (1897); *Com. v. Northern Cent. Ry.*, 2 Dauph. 67 (1897.)

26 *Com. v. Northern Central Ry. Co.*, 2 Dauph. 67 (1897.)

27 *Com. v. Philadelphia Trac. Co.*, 1 Dauph. 117 (1889.)

28 *Com. v. Philadelphia Trac. Co.*, 1 Dauph. 117 (1889.)

A corporation is not liable for a tax on a mortgage issued by private parties upon property subsequently purchased by the corporation, where it appears that the corporation had not assumed the mortgage as its own indebtedness.²⁹

Three street railway companies contemplating a lease of their lines to a fourth company, had their stockholders deposit their stock with a trustee, who issued to the stockholders stock trust certificates. Subsequently the leases were executed, under which the lessee company agreed to pay as rental a net sum equal to a certain per cent. upon the amount of the stock trust certificates. These rentals were paid over to the lessor companies and by them paid to the trustee, who in turn paid them out in the form of interest upon the stock trust certificates. It was held that the lessors were not liable for a tax on the stock trust certificates as a loan under the Act of June 30, 1885.³⁰

Property Exempt from Local Taxation.

299. Only the property of a railroad company which is indispensably necessary to the operation of the railroad, as such is exempt from taxation for local purposes.³¹

Lots and buildings which are used as the general repair shops of a railroad company, where the use is exclusive and limited to repairs and rebuilding, in reconstructing and restoring the motive and rolling stock of a company from dangerous to safe condition after accidental injury and natural wear and tear, are exempt from local taxation; but if such buildings are used for construction purposes, they are subject to local taxation.³²

But where a railroad company uses its shops to repair its own cars and also for necessary repairs on cars of other lines, and in addition built new cars or rebuilt old ones so as to

²⁹ *Com. v. Union Trac. Co.*, 192 Pa. 507 (1899); affirming 1 Dauph. 169 (1898.)

³⁰ *Com. v. Union Trac. Co.*, 192 Pa. 507 (1899); affirming 1 Dauph. 169 (1898.)

³¹ *Western New York & Pennsylvania R. R. v. Venango Co.*, 183 Pa. 618 (1898); affirming 5 Super. Ct. 304 (1897.)

³² *Western New York & Pennsylvania R. R. v. Venango Co.*, 183 Pa. 618 (1898); 28 Pitts. 341 (1898); affirming 5 Super. Ct. 304 (1897.)

make them substantially new, even if some portion of the old material is used, the shops are exempt from local taxation only by the proportion the repair business bears to the entire business.³³

Shops, buildings, etc., in which current repairs of cars, locomotives and such other things as are ordinarily pertinent to railroads are made, and used also for manufacturing bolts and all parts necessary for such repairs, are reasonably necessary as a part of the corporate equipment of the carrying company and cannot be taxed as real estate by the local authorities.³⁴

Where the only motive power of a street railway company consists of horses, and it appears that all of the horses were used in moving the cars of the company, such horses are exempt from local taxation. In such a case it is immaterial that one or more of the horses were occasionally used in hauling feed to the company's stable, or in hauling money to the company's bank, or in making repairs to the company's tracks.³⁵

The power house of an electric railway is exempt from taxation.³⁶

Where a traction motor company operates a street railway and leases the property and franchises of various railway companies and operates them on its own account, it is exercising the franchise of a street railway company and is subject to the Act of April 21, 1858, which provides that "the offices, depots, car houses and other real property of railway corporations situate in the city of Philadelphia, the superstructure and water stations alone excepted," are subject to tax for city purposes.³⁷

Under the special Act of January 4, 1859, enabling the city of Pittsburg to tax real estate belonging to railroad companies, the city may tax the terminal station of an incline plane com-

33 Allegheny Valley Ry. v. Verona Borough, 29 Pitts. 314 (1899.)

34 Lehigh Valley R. R. v. Bradford County Commissioners, 24 Pa. C. R., 537 (1901.)

35 Peoples Pass. Ry. Co. v. Taylor, 22 Super. Ct. 156 (1903); affirming 10 Dist. 343 (1901.)

36 Philadelphia v. Electric Traction Co., 208 Pa. 157 (1904.)

37 Philadelphia v. Philadelphia Trac. Co., 206 Pa. 35 (1903.)

pany. Such a company is a railway within the meaning of that Act and the Act of May 1, 1876, under which it was incorporated.³⁸

The special Act of April 6, 1870, P. L. 935, relative to taxing railroads, coal banks, etc., in Hickory township, Mercer County, imposes a school tax on collieries and property belonging thereto, and does not apply to railroads, which pass through the township having no connection with collieries.³⁹

Municipal Liens for Paving.

300. A municipal lien for paving cannot be filed against the roadbed of a railroad.⁴⁰

While the roadbed of a railroad is not subject to general taxation nor to special assessments for city improvements, this exemption does not apply to a large tract of land, fifteen hundred feet wide, used as a coal and ore terminal and covered with tracks. A lien for sewer assessments will lie against so much of such land as is actually not part of the roadbed. The fact that the court cannot say on a scire facias just how much of the tract is roadbed, does not prevent an entry of judgment. In the subsequent sale the plaintiff can take title only to that against which he has a lien. The title to the roadbed will not pass to him.⁴¹

In Philadelphia, under the Act of April 21, 1858, P. L. 385, all of the property of a railroad company is subject to assessment for municipal improvements, except the actual roadbed and water stations. The word "superstructure" used in the act means the roadbed with whatever has been constructed upon it.⁴²

An ordinance requiring lot owners to lay sidewalks is a

38 *St. Clair Incline Plane Co. v. Pittsburgh*, 32 Pitts. 190 (1901.)

39 *Hickory Township v. Shenango Valley R. R. Co.*, 5 Super. 79 (1897.)

40 *Erie v. Lake Shore & Michigan Southern R. R.*, 175 Pa. 523 (1896.)

The power house of a street railway company containing engines and machinery, etc., is not the subject of a mechanic's lien.—*Oberholtzer v. Norristown Pass. Ry.*, 10 Montg. 42 (1894); 16 Pa. C. C. R. 13 (1894); 6 Del. 88 (1894); *Christ v. Schuylkill Electric Ry.*, 9 Dist. 268 (1900); 23 Pa. C. C. R. 353 (1900); 16 Montg. 93 (1900); 14 York 8 (1900.)

41 *Philadelphia v. Philadelphia & Reading R. R.*, 177 Pa. 292 (1896.)

42 *Philadelphia v. Philadelphia & Reading R. R.*, 177 Pa. 292 (1896.)

police regulation. A duty is imposed thereby, the neglect of which creates a liability to the municipality for the cost it has incurred in doing that which they ought to have done. It is not a tax, or a local assessment in the nature of a tax based on special benefits accruing, or supposed to accrue, to the land-owners though ordinarily these are a full equivalent for the cost. A railroad company is not excused from obeying regulations of this character.⁴³

Where a railroad company purchased land lying between its tracks and a borough street in order to improve its property and used the rear of the land for railroad purposes, the borough may on notice and refusal by the railroad company to lay a pavement in front of said land, build the pavement and, by an action of assumpsit, collect the costs thereof with twenty per cent. added, as directed by borough ordinance from the company. It is no defence to such an action that the pavement was unnecessary and of no use to the company, and not asked for by it, and that some time in the future it may want to use the ground for its roadbed, and that the work was poorly done and not worth the amount charged.⁴⁴

License Tax on Street Cars.

301. A municipality may impose a reasonable license tax on electric cars as a police regulation.

An ordinance of a municipality is not void as being vague and indefinite when provision is made enabling the company to obtain an annual license for all cars owned or operated by it by the annual payment of a fixed sum.⁴⁵

A municipality may impose a license tax of twenty-five dollars upon each street car run or operated in the city, to be paid into the city treasury for the use of the city. In ascertaining the number of cars taxable, the number of trucks are alone to

43 *Mt. Joy Borough v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*, 19 *Lanc.* 217 (1902); 11 *Dist.* 765 (1902); 8 *North.* 247 (1902.)

44 *Mt. Joy Borough v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*, 19 *Lanc.* 217 (1902); 11 *Dist.* 765 (1902); 8 *North.* 247 (1902.)

45 *North Braddock Bor. v. Second Avenue Trac. Co.*, 8 *Super. Ct.* 233 (1898); affirming 28 *Pitts.* 278 (1898.)

be considered. The fact that the same trucks may carry a different body in summer than in winter, is immaterial.⁴⁶

The imposition by a borough of a license tax upon each street railway car operated regularly within its limits is an exercise of the police power delegated by the State, and such license may, in the exercise of the same power, be increased from time to time, where such increase is reasonable and warranted by conditions affecting the railways.⁴⁷

While a municipal ordinance imposing an annual license fee of \$10 a car is reasonable, an ordinance which imposes such a fee and to which is added a penalty of \$25 for each car not licensed, is unreasonable and void.⁴⁸

The Act of May 23, 1889, P. L. 277, relating to cities of the third class, authorizes a tax upon or in respect of each car of

⁴⁶ *Erie City v. Erie Electric Motor Co.*, 24 Super. Ct. 77 (1903.)

In this case Orlady, J., said:

"From the undisputed testimony it appears that the company had forty-nine complete car trucks, which could be used with its eighty car bodies. The car bodies were so constructed that twenty-one of the whole number could be used on summer or open cars as might be indicated or needful for the public comfort or economic management of the corporate business. Eight of the trucks were not used so that but forty-one were in use for either closed or open bodies, and these forty-one were in service during the license year. While each part of a car-truck or body is a necessary constituent of a completed car, in determining the largest possible number of entire cars to be formed by assembling the trucks and bodies, we are limited to the possible number of available car trucks. The trucks are the primary or principal part of the car and the body is secondary. The trucks could be used on the streets irrespective of the kind of car body, and without the trucks the bodies were useless. Whether the trucks were mounted with a winter or a summer body or with a flat platform, there could not be more than forty-nine cars made up from the whole equipment of the company. The company could effect as many combinations as it had car bodies, yet that number would not represent the correct number of cars it could run and operate, and a tax imposed on the whole number of car bodies would necessarily impose a tax on a truck which had been licensed with another car body. The unused parts of a car in the shops or car barns which were held in reserve for climatic changes and substituted to meet such exigencies are only auxiliary parts of the cars in actual use."

⁴⁷ *Shenandoah Borough v. Schuylkill Trac. Co.*, 27 Pa. C. C. R. 465 (1903); 12 Dist. 154 (1903.)

⁴⁸ *Chester Trac. Co. v. Ridley Park Bor.*, 7 Del. 302 (1898.)

a street passenger railway company and not a tax upon the business or occupation in which the company is engaged. Such tax is not a license fee imposed under the police powers, but a tax in a general sense as was decided in *Oil City v. Trust Co.*, 151 Pa. 454. Nor does the Act violate Art. 9, Sec. 1, of the Constitution, requiring uniformity of taxation. Although the ordinance provides a penalty for refusal to pay, the remedy is not exclusive so as to prevent a civil action to recover the tax.⁴⁹

Where a street railway company, which runs between two points in two townships, passes through a city on its way from one terminus to the other, the city may levy a tax upon each car running into the municipality. Liability for the car tax attaches, as for separate cars, where two car bodies were so arranged that from time to time they could be placed on the same set of trucks.⁵⁰

License Tax on Poles.

302. A borough may impose a license fee upon the poles of electric railway companies erected along the borough streets and an annual fee of \$1.00 per pole is not unreasonable.⁵¹

By an ordinance of the borough (now city) of McKeesport, approved Sept. 22, 1886, the McKeesport (now the McKeesport & Reynoldton) Passenger Railway Company was granted the right to use certain streets therein named upon certain conditions. Section 3 of the ordinance provided that the borough should levy no license for borough purposes for the franchises granted, until after the expiration of five years after the company commenced operating its road. By another ordinance approved Sept. 4, 1890, the railway company was authorized to use and occupy additional streets and to use electricity as a motive power, etc. Section 7, of this ordinance provided that for a period of fifteen years from and after the completion of the line the railway company should be exempt from the payment of any license to the borough for the franchises granted by its several ordinances. Section 6 provided

49 *Harrisburg v. East Harrisburg Pass. Ry.*, 4 Dist. 683 (1895.)

50 *Harrisburg v. Citizens Pass. Ry.*, 4 Dist. 687 (1895.)

51 *Lansdowne Bor. v. Delaware Co. & Phila. Elec. Ry.*, 7 Del. 173 (1898); affirmed 9 Super. Ct. 621 (1899); 7 Del. 398 (1899.)

that the ordinance shall not be enforced until a certain contract attached thereto is duly executed by the borough and the railway company; such contract was duly executed on the same day.

On the 8th day of August, 1892, an ordinance was passed by the city of McKeesport "providing for the levy and collection of a license tax on telegraph and other poles in the city." In 1895 the city of McKeesport sued the McKeesport & Reynoldton Passenger Railway for the amount of the license tax on 363 poles for the years 1893 and 1894 and the penalty of 10 per cent. for the non-payment of the same, amounting to \$198.60.

Willard, J., said, in entering judgment for the plaintiff:

"It does not follow because it was stipulated in the ordinances that the railway company should be exempt for five and fifteen years respectively from the payment of any license for the franchise granted that the city should not exact from this company, as well as other persons, companies and corporations, the reasonable license fee imposed by the ordinance ordained and enacted solely as police regulations for the proper and just protection of its citizens. . . . The State cannot bargain away its right to exercise at all times the police power, nor can a municipality to which is delegated the right to exercise the State's police power over streets and highways enter into any contract by which the full exercise of the power granted can be abridged, limited or destroyed. If it was within the power of the councils of McKeesport to bargain with this railway company for immunity and exemption for fifteen years, why not for one hundred years or perpetually?

It is not in the power of the councils of McKeesport of the present year to enter into a contract in any form by ordinance or written agreement so as to prevent the councils of another year from passing an ordinance as a proper police regulation, destroying and rendering null and void the contract so entered into by the previous council."⁵²

⁵² *McKeesport v. McKeesport and Reynoldton Pass. Railway Co.*, 2 Super. Ct. 242 (1896); *Shenandoah Bor. v. Schuylkill Trac. Co.*, 27 Pa. C. C. R. 465 (1903.)

When Railroad is in Hands of a Receiver.

303. The fact that a railroad company was in the hands of a receiver appointed by the United States Circuit Court does not prevent the officers of the Commonwealth from settling a tax account against the company under the Act of June 7, 1879.⁵³

53 *Com. v. Buffalo, New York & Philadelphia R. R.*, 2 Dauph. 216 (1888.)

CHAPTER XLVII.

LATERAL RAILROADS.

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|---|--------------------------------------|
| 304. Constitutionality of the Act of July 5, 1883. | 307. Necessity for Lateral Railroad. |
| 305. Scope of the Act of July 5, 1883. | 308. Appointment of Viewers. |
| 306. Lateral Railroads Distinguished from Public Railroads. | 309. Damages. |
| | 310. Appeals. |

Constitutionality of the Act of July 5, 1883.

304. The Act of July 5, 1883, regulating lateral railroads is not defective in title and is constitutional as a supplement to the Act of May 5, 1832.¹

Scope of the Act of July 5, 1883.

305. Under the Act of July 5, 1883, P. L. 176, where the size of a coal mining plant is in proportion to the area of coal to be mined, and a "plan of the mining operations to be pursued in the mining of the coal" has been formulated and followed, the plant, the plan of operation and the area of coal with which they are connected may be designated as a coal mine. In a petition for the appointment of viewers for a lateral railroad where the court finds that the immediate result of the construction of the lateral railroad would be a lateral railroad from a coal mine passing through a property which constituted a coal mine within the meaning of the Act, the petition will be dismissed. The object of the Act of 1883 was the protection of the owners of intervening mines; and while it was the purpose of lateral railroad legislation to bring coal and other minerals into market, it is just as apparent that the intention of the Act of 1883, founded upon experience and justice, was that this should not be done in such a manner as would interfere

¹ Rodger's Petition, 192 Pa. 97 (1899.)

with a prior enterprise to the same end. Nor is it necessary to regard undeveloped coal as "land" in order to bring it within the spirit and intent of the original Act of 1832.²

Lateral Railroads Distinguished from Public Railroads.

306. A railway, constructed for a length of three miles, solely for the purpose of carrying the coal of one company and owned by the members of that company, is a lateral railway and is not entitled to the rights of a public railroad, and its construction over private property will be restrained under the Act of June 19, 1871. If the railway is constructed not only for the purpose of carrying the coal of one coal company, but also for carrying various products of people and corporations along its line, and its building may be considered a reasonable business proposition, then it is a public railroad and is entitled to the right of eminent domain.³

Necessity for Lateral Railroad.

307. Before a petitioner for a lateral railroad can enter upon the premises of a land owner to construct a road, the necessity for the road must be finally determined. Under the Act of February 17, 1871, P. L. 56, the questions both as to the necessity of a lateral railroad and of the damages for the taking of the land are subject to review on appeal, and the petitioner for the road has therefore no authority, after the question of necessity for the road has been decided in his favor by the viewers and court below, to enter a bond and proceed with the construction of the road until the appeal has been determined.⁴

The necessity for the lateral railroad on the route selected by the petitioner is a question for the jury, under proper instructions from the court, and they cannot take into consideration that a better, cheaper and more convenient route might have been selected.

Mestrezat, J. said: "The Act of May 5, 1832, P. L. 501 and its supplements require the petitioner or petitioners for a

² Rodger's Petition, 192 Pa. 97 (1899.)

³ Robbins v. Western Washington R. R., 31 Pitts. 181 (1900.)

⁴ The Act of Feb. 17, 1871, repealed the Act of April 20, 1858, by implication in this respect. Painters Lateral R. R., 198 Pa. 461 (1901.)

lateral railroad to 'survey and mark such route as he or they shall think proper to adopt;' and thereupon the viewers and subsequently on appeal the court and jury shall determine the necessity for the road and the damages sustained by the owner of the intervening lands by its construction and use. This excludes from the consideration of the viewers and the jury any other route as bearing on the necessity of the location adopted by the petitioner. There may be a better and less expensive route; but that is a matter entirely with the petitioner and not with the land owner, and cannot avail the latter in the determination of the necessity for the selected route."⁵

Under the Act of April 20, 1858, supplementary to the Act of May 5, 1832, the court determined the necessity of the road, the jury on appeal determined only the amount of damages; under the supplementary Act of Feb. 17, 1871, the jury on appeal from the report of viewers pass not only on the matter of damages, but also on the necessity of the railroad and therefore until the necessity of the railroad is determined, the court will not approve the bond and until that time the land cannot be appropriated.⁶

Appointment of Viewers.

308. Where a petition for the appointment of viewers in a lateral railroad proceeding under the Act of May 5, 1832, is filed and a neighboring mine owner files an answer, averring that the road would pass through his mine and seriously injure it, the court will not decide in limine the question raised by the answer, but will appoint the viewers, and decide such questions upon exceptions to their report.⁷

Damages.

309. Where land was condemned for a lateral railroad, and it appeared that the land had at one time been divided into two

⁵ *Frick Coke Co. v. Painter*, 198 Pa. 468 (1901); see also *Bessemer Coke Co.'s Lateral R. R.*, 18 Pa. C. C. R. 440 (1896); *Lake Erie Limestone Co.'s Appeal*, 188 Pa. 509 (1898.)

⁶ *Bessemer Coke Company's Lateral Railroad*, 18 Pa. C. C. R. 440 (1896); 5 Dist. 765 (1896); 27 Pitts. 227 (1896.)

⁷ *Graff's Case*, 23 Pa. C. C. R. 349 (1900); 9 Dist. 372 (1900); 30 Pitts. 423 (1900); 6 Lacka. 95 (1900.)

separate farms owned by different parties and that the present owner derived title from these parties, it is proper to treat the land as one tract in assessing the damages.⁸

The measure of damages for the taking of land for a lateral railroad is the difference in the market value of the whole property immediately before and after the construction of the road.⁹

Appeals.

310. Under the lateral railroad act an appeal from an order directing a bond to be filed before the viewers have reported is premature and will be quashed. "There can be no entry on land or commencement of the railroad until the viewers have determined the necessity of the road and the court has approved their report. In this respect the proceedings under the lateral railroad acts differ from those under the general railroad laws. Corporations having the full power of eminent domain determine for themselves in advance the necessity and occasion for its exercise. Hence it is held that on the filing of a sufficient bond to secure damages, the title to the land is divested and the corporation is authorized to enter and construct its road: *Fischer v. R. R.*, 175 Pa. 554. But under the lateral railroad acts the necessity is not determined by the petitioner, but by the viewers, with the approval of the court, or by the verdict of a jury upon an appeal, and until this preliminary requisite has been established no entry on the land is authorized. By the Act of May 5, 1832, Sec. 3, P. L. 501, the ground could not be broken or the construction of the road commenced until the damages reported by the viewers or awarded by the jury were tendered or paid to the land owners. But by the Act of April 20, 1858, Sec. 1, P. L. 3601, 'when, in the opinion of the court the road is necessary . . . it shall be lawful for the petitioner, upon giving bond to be filed with the petition . . . to proceed in the opening,' etc. The proper practice is to defer the filing of the bond until after the court has approved the report of the viewers or in case of an appeal until after the verdict of the jury, which under the Act

8 *Frick Coke Co. v. Painter*, 198 Pa. 468 (1901.)

9 *Frick Coke Co. v. Painter*, 198 Pa. 468 (1901.)

of February 17, 1871, P. L. 56, may decide the fundamental question of necessity against the petitioner. In the present case the bond was filed at the same time as the petition and was approved by the court. This was premature, but it did the appellant no harm. It was without effect in authorizing an entry on the land until the necessity of the road is settled. If upon the coming in of the viewers' report, the bond should appear to be insufficient in amount or otherwise exceptionable, the court has ample power to require it to be enlarged or corrected or a new one filed before entry on the land. The present appeal being before the termination of the proceedings in the court below, was premature and must therefore be quashed."¹⁰

¹⁰ Lake Erie Limestone Co.'s Lateral R. R., 188 Pa. 509 (1898); 29 Pitts. 235 (1898), per Mitchell, J.; see also Lake Erie Limestone Co.'s Appeal, 188 Pa. 509 (1898); 46 Pitts. 235 (1898); Painter's Lateral R. R., 198 Pa. 461 (1901.)

CHAPTER XLVIII.

STREET RAILWAYS—LOCATION AND CONSTRUCTION.

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Legislative Authority to Use Streets and Roads.

311. Under the street railway Act of May 14, 1889, P. L. 211, street railway companies are confined in the location of their route to established streets or other avenues in cities and boroughs and to public highways in townships, and have no

roving commission to locate, construct and operate street railways wherever they please.¹

The Act of May 14, 1889, P. L. 211, does not authorize two street railway companies to lay their tracks at the same time upon the same highway. It only authorizes a company to construct and operate a railway on a street or highway upon which "no track is laid, or authorized to be laid," under any existing charter. The time of which the act speaks is the time of incorporation, and not the time of the passage of the act.²

1 In *Northern Central Railway Co. v. Harrisburg & Mechanicsburg Electric Ry.*, 177 Pa. 142 (1896), Chief Justice Sterrett said:

"Their right to construct, maintain and operate street railways is specifically limited to existing streets and highways. The names of the streets and highways selected by them must be stated in each company's articles of association. In the recorded action of the company, exercising the branching power, etc., authorized by the act, it must also 'distinctly name the streets and highways on which said extension or branch is to be laid or constructed.' In brief, in the selection or adoption of the route, either of their main line, or of any extension or branch thereof, they are expressly confined to established streets or other avenues in cities and boroughs, and to public highways in townships, subject to such further restrictions, even as to them, as are specified in the act. Outside of and beyond the restricted power and authority, as to selection and adoption of a route, etc., thus granted, they are not invested with any other authority in that regard, except such as may be necessarily implied. Without ignoring the well settled rules applicable to the construction of charters, it is impossible to reach any other conclusion than that the legislature, in this carefully drawn and well-guarded act, intended to withhold from companies chartered thereunder everything in the nature of a roving commission under which they might assert the right to locate, construct and operate street railroads wherever they pleased."

2 *Homestead St. Railway v. Homestead Electric St. Ry.*, 166 Pa. 162 (1895); 25 Pitts. 357 (1895); Green, J., said:

"It is very easy to see how the right of the general public to free and unobstructed travel may become most seriously impaired if there should be an unlimited right to occupy the streets and highways of the commonwealth with railway tracks. Even one track becomes at times, especially in our large towns and cities, an obstruction to travel. The great bulk of travel is off, and not on, our street cars. In the crowded thoroughfares, particularly where the streets are constantly occupied by horses and carriages, heavy wagons, carts, drays, omnibuses and other vehicles, a duplication of street car tracks would be an intolerable burden and a most serious obstruction. Even on country roads where travel is much less, the traveled part of the road is so much narrower than in the cities and towns

The general street railway Act of May 14, 1889, P. L. 211, was intended as a comprehensive system for the organization and government of street railway companies. It was intended to afford a method for companies organized under laws that were invalid, such as the Acts of 1878 and 1879, to secure a lawful corporate character, and also to open a way for companies legally organized under special acts of assembly to surrender their special privileges and obtain those provided by the statute. The words "under color of" in the sentence in Section 20 that reads "any street passenger railway company heretofore existing under color of any charter or letters patent," apply not merely to companies organized under defective laws, but to those organized under special acts which are valid.³

A toll bridge is a highway which a street railway company may use under the Act of May 14, 1889, P. L. 211, which authorizes the formation of companies for the purpose of constructing, maintaining and operating a street railway upon any street or highway for public use in the conveyance of passengers by any power other than by locomotive. If the corporation which owns such a bridge refuses permission to a street railway company to use the bridge, the latter company may enforce the use by a bill in equity.⁴

If the bridge is not sufficient to accommodate both the street

that the obstruction would be felt quite as severely as in the streets of the cities. It is a very proper inference, therefore, that when the legislature prohibited, in the fundamental law of street railways, the laying of more than one track upon one street or highway, it was for the purpose of preventing the obstruction of travel on the highways of the commonwealth." See *Babcock v. Scranton Traction Co.*, 1 Lacka. 223 (1895.)

3 *Berks County v. Reading City Pass. Ry. Co.*, 167 Pa. 102 (1895.)

4 *Pittsburgh & West End Passenger Railway v. Point Bridge Co.*, 165 Pa. 37 (1894); 25 Pitts. 192 (1894); see also *Conshohocken Ry. Co. v. Pennsylvania R. R.*, 15 Pa. C. C. R. 445 (1894); *Venango Co. Commissioners v. Oil City St. Ry.*, 3 Dist. 546 (1894). The word "street" in the Act of 1889 includes "roads," per Hensel, Attorney-General in *Gettysburg Battlefield Electric Ry.'s Case*, 13 Pa. C. C. R. 337 (1893). See also *Pennsylvania R. R. v. Greensburg & Jeannette St. Ry.*, 176 Pa. 559 (1896). The act includes turnpikes. *Allentown & Coopersburg Turnpike Co. v. Lehigh Val. Traction Co.*, 174 Pa. 273 (1896). See *Johnstown & Scalp Level Turnpike Co. v. Johnstown Pass. Ry.*, 4 Dist. 594 (1895.)

railway and the public, the railway company cannot exclude the public, nor can it demand that the local authorities shall supply a viaduct for the railway at the point where the bridge is situated.⁵

The Secretary of the Commonwealth, in an application for a charter for a street railway company, has not the power to pass upon such questions as, whether the company can occupy streets already occupied by a street railway company, or lay its tracks partly on private property or cross other railways diagonally or whether the construction upon highways imposes an additional servitude upon the property. If the application is in proper form the charter should be granted and these questions determined by the courts.⁶

Municipal Consent—In General.

312. A municipality has no power to authorize the occupation of streets for street railway purposes in the absence of a charter from the Commonwealth, nor has it power where there is such a charter, to grant a license to use streets, other than those covered by the charter route.

Defendant company obtained a charter for the construction of its railway over a certain street in the city of Monongahela, and a franchise was granted by the proper municipal authorities for the construction of said railway over the street designated in its charter. The railway company obtained an additional consent from the municipal authorities to erect its feed line on streets not included in its charter route. It was held that a municipality has no power to grant a franchise to a street railway company over streets not included in the charter route and the construction of feed lines on such streets will be enjoined.⁷

A valid municipal consent to the construction of a street railway on a highway cannot be given until after a street railway company is organized under the Act.

5 *Larue v. Oil City St. Pass. Ry.*, 170 Pa. 249 (1895.)

6 *Pittsburg Rapid Transit St. Ry. Co.'s Case*, 28 Pa. C. C. R. 151 (1903); 34 Pitts. 7 (1903); 12 Dist. 454 (1903.)

7 *Van Voorhis v. Pittsburg & Charleroi St. Ry. Co.*, 34 Pitts. 150 (1903); 9 North. 122 (1903). See *Hannum v. Media, M. A. & C. Electric Ry.*, 200 Pa. 44 (1901.)

One street railway company obtained its charter on November 16, 1893, and the municipal consent on December 19, 1893. Another company obtained its charter on November 29, 1893, but the municipal consent was granted to it on November 20, 1893. Both companies obtained the right to lay tracks on the same highway. It was held that the first company had the right to lay the tracks.⁸

A street railway company, incorporated under the Act of 1889, P. L. 211, has no right to construct its railway within the limits of a township, upon the bed of a turnpike road, without the consent of the local authorities; even although the local authorities do not move to restrain, the court will enjoin, at the instance of the turnpike company, the party who suffers special damages.⁹

Until the consent of the local authorities has been obtained, another company may be lawfully chartered to build a railway over the same route, under Art. 17, Sec. 9, of the Constitution, and the Act of May 14, 1889, Sec. 15, and may build the railway if the local consent is secured.

In such case the failure of a company to secure the municipal consent for several years is such laches as will prevent it from claiming any rights under its charter so as to defeat the right of the other company to exist.¹⁰

A street railway company which has been granted a charter for a street railway over certain streets, but which has failed to obtain municipal consent for the construction of its road, has no standing to restrain another company subsequently chartered from building over the same streets, where it appears that the second company has received the municipal consent. The reasonable time within which, under the Act of

8 *Homestead St. Ry. v. Homestead Electric St. Ry.*, 166 Pa. 162 (1895); 25 Pitts. 357 (1895); *Babcock v. Scranton Traction Co.*, 1 Lacka. 223 (1895.)

9 *Harrisburg & Mechanicsburg Elec. Ry. v. Harrisburg, Carlisle & Chambersburg Turnpike Co.*, 15 Pa. C. C. R. 389 (1894); 4 Dist. 17 (1894); *Johnstown & Scalp Level Turnpike Co. v. Johnstown Pass. Ry.*, 4 Dist. 594 (1895); *Collins v. Carbondale Trac. Co.*, 5 Dist. 18 (1895.)

10 *Com. ex rel. v. Philadelphia, Morton & Swarthmore St. Pass. Ry.*, 8 Del. 9 (1900); 3 Dauph. 181 (1900); 7 North. 242 (1900.)

May 14, 1889, the municipal consent must be obtained is fixed by the Act of June 7, 1901, at two years.¹¹

A street railway company, availing itself of the provisions of Secs. 14 and 17 of the Act of 1889, presented to the court its petition for the appointment of viewers. Viewers were accordingly appointed and a report was filed. The consent of the local authorities for the construction of the street railway had not been obtained. It was held that the court would set aside the appointment of viewers. "The law ought not and will not lend its aid to the perpetration and maintenance of a nuisance under cover of an assessment of damages."¹²

A company incorporated under the Act of June 7, 1901, has an exclusive right to occupy the highways described in its charter route. Under such Act the incorporation of any other company within the time limited for municipal consent and construction is prohibited. If such a franchise is granted it will not only be forfeited at the instance of the Commonwealth, but the older company, even if it has not acquired such authority to build, has an equitable right to enjoin the second company without the intervention of the attorney general.¹³

If a street railway company, chartered prior to the Act of June 7, 1901, has completed two-thirds of its road and has secured the proper consent of local authorities and land owners over its entire route and is proceeding with due diligence to complete its road, it cannot be deprived of any portion of its located route by a company incorporated under the Act of June 7, 1901, although such company has obtained local consent for the disputed distance.¹⁴

Where two street railway companies claim a right to lay tracks upon a public highway; the one by agreement with the turnpike company; the other by condemnation proceedings

¹¹ *Coatesville & Downingtown Str. Ry. v. Uwchlan Str. Ry.*, 18 Super. Ct. 524 (1901.)

¹² *Harrisburg & Mechanicsburg Electric Ry. Co. v. Harrisburg, Carlisle & Chambersburg Turnpike Co.*, 15 Pa. C. C. R. 389 (1894); 4 Dist. 17 (1894.)

¹³ *Easton & Belvidere Str. Ry. Co. v. Blue Ridge Trac. Co.*, 9 North. 1 (1903.)

¹⁴ *Catawissa & Bloomsburg Elec. Str. Ry. Co. v. Columbia & Montour Electric Ry. Co.*, 26 Pa. C. C. R. 550 (1902); 12 Dist. 101 (1902.)

under the Act of May 14, 1889, neither method can give a complete right to occupy the highway. The consent of both the local authorities and the property owners affected must be obtained, and neither an agreement with the turnpike company nor proceedings by way of condemnation can be substituted.¹⁵

In a suit by street railway companies involving conflicting claims to occupy the same highway, the local authorities, township, borough or turnpike must be made parties to the suit.¹⁶

A corporation which has assumed, under the Act of June 12, 1893, P. L. 451, the duty of making and repairing highways, has a standing in equity to enjoin the construction of a street railway where the consent of the proper municipal authorities has not been obtained by the railway company.¹⁷

A street railway company which has a charter right to construct a railway between two points, has a standing to object to the construction of a line by another company on the ground that the latter company has not obtained the proper municipal consent, although the consent to the construction of its own line claimed by it is denied.^{17*}

A burgess of a borough has a standing in equity to restrain the construction of a street railway on a street of the borough where the borough has not consented to such construction. A person or corporation showing special damage may object to the construction.¹⁸

Where a street railway company uses tracks belonging to a municipality across a city bridge, under an agreement that other street railway companies may use the tracks jointly, it cannot restrain, by injunction, the joint use of the tracks by

15 *Middletown, Highspire & Steelton Str. Ry. v. Middletown Electric Ry.*, 2 Dauph. 319 (1895.)

16 *Middletown, Highspire & Steelton Str. Ry. v. Middletown Elec. Ry.*, 4 Dist. 32 (1894) ; 16 Pa. C. C. R. 127 (1894) ; 4 Dauph. 280 (1894.)

17 *Lehigh Coal & Nav. Co. v. Inter-County St. Ry.*, 167 Pa. 75 (1895.)

17* *Tamaqua & Lansford St. Ry. Co. v. Inter-County St. Ry.*, 167 Pa. 91 (1895.)

18 *Lehigh Coal and Nav. Co. v. Inter-County St. Ry. Co.*, 167 Pa. 126 (1895) ; *Perkiomen Ry. Co. v. Schuylkill Val. Traction Co.*, 14 Mont. 22 (1897.)

another company that has obtained the consent of the proper authorities of the city.¹⁹

The Act of November 22, 1873, P. L. (1874) 444, authorized a street railway company to extend its routes on certain specified streets in the city of Philadelphia, "and on such other street or streets south of Christian street, west of Twentieth street, north of Columbia avenue, and east of Third street as councils of the city of Philadelphia may from time to time permit or authorize to be used by said company with single or double tracks." Two of these streets,—Christian in the southerly and Columbia avenue in the northerly section of the city,—run nearly east and west, and both are crossed at right angles by the other two,—Third and Twentieth streets,—while York street is north of and parallel with Columbia avenue. It was held, that the street railway company, with the consent of councils, had a right to occupy York street between Fourth and Twentieth streets, and that the company was not limited by its charter merely to those streets within the lines of the southwesterly angle formed by the intersection and extension of the lines of Christian and Twentieth streets, and of the northeasterly angle formed by the intersection and extension of the lines of Third street and Columbia avenue.²⁰

City councils cannot, without an express reservation of the right, recall or revoke a street franchise or license lawfully granted, after the grant has been duly accepted, and the grantee has proceeded in good faith and according to the terms of its charter to exercise the privileges conferred.²¹

The veto of an ordinance which authorized the construction of a street railway is a refusal of municipal consent, and the introduction of a new ordinance for the same purpose does not suspend its effect as such.²²

It is not necessary to give notice to property owners of a

19 *People's Pass. Ry. v. Union Pass. Ry.*, 15 Pa. C. C. R. 498 (1894); 3 Dist. 717 (1894.)

20 *Com. ex rel. v. Union Pass. Ry.*, 163 Pa. 22 (1894.)

21 *Avoca Borough v. Pittston, Jenkins & Avoca Str. Ry.*, 7 Kulp 470 (1894.)

22 *Reading & Temple Elec. Ry. v. Reading & Southwestern Str. Ry.*, 11 Dist. 30 (1901.)

resolution of a borough council, approving a plan by which the curb of a sidewalk was changed from a square to a curve; neither does the resolution approving the plan which was provided for in the original ordinance granting the right to lay tracks require the signature of the burgess.²³

The licenses of a turnpike company and township supervisors to a railway company to lay tracks along a turnpike do not confer the right of eminent domain, and give no right to invade private property.²⁴

Municipal Consent—All Municipalities on Route Must Consent.

313. Where a street railway must necessarily pass through several municipal divisions, such as townships, boroughs, or cities, and one of the municipal divisions refuses to consent to the construction of the road, the power to build the road in the municipal divisions which had given their consent fails.²⁵

23 *Condon v. Wilksburg & East Pittsburg Str. Ry.*, 30 Pitts. 289 (1900.)

24 *Philadelphia & Trenton R. R. v. Philadelphia & Bristol Pass. Ry.*, 6 Dist. 269 (1897.)

25 In *Pennsylvania Railroad v. Montgomery County Pass. Ry.*, 167 Pa. 62 (1895), where this question first arose, the Supreme Court explained the reason for the rule as follows: "A steam railroad may enter upon any part of its line and commence building subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain, and may enter and appropriate land regardless of the will of the owner. A street railway company, as we have seen, does not possess the power of eminent domain. It cannot build under its charter alone. It must have the consent of the proper municipal or local authorities or it cannot move. If the proposed line passes through a city, borough or township, intermediate the termini and that city, borough or township, refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line before it has a right as against any city, borough or township into which its line extends. It is not possible for such company to complete its line without the consent of the local authorities of the districts through which it passes; and where this is refused in one or more of the municipal or quasi municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility. Let us suppose, for the purpose of illustration, a charter to authorize the construction of a street railway from A, through certain roads in B, C and D,

Municipal consent cannot create or enlarge corporate franchises, and where a street railway company has a trunk franchise and branch franchises if the trunk has no sufficient legal existence, its branches must also fail and the municipality's consent to their construction will not avail the company.²⁶

A street railway company has no power to authorize contractors to dig trenches and make excavations in a borough which has consented to the construction of its road, where it appears that the route of the traction company extended through several townships and boroughs which had not consented; and if such contractors are forcibly prevented by a corporation having a right in that locality, either in the nature of an easement or ownership in the land from making such excavations, the contractors being trespassers, have no right of action against such corporations.²⁷

If a street railway company adopts as part of its route a

to the city of E; and that consent has been obtained from the local authorities of A, of C, and of E, but refused by the local authorities of B, and D. The proposed line is thereby cut up into three wholly unconnected pieces. It is very clear that under a charter authorizing the building of a line of road from A to E, the company could not lawfully build three distinct local roads, viz., one in A, another in C, and the third in E. The consent given by A to the construction of the line of road authorized by the charter would not estop the local authorities from objecting to the construction of a local road within its own limits. When confronted with its own consent A could well reply 'the road to which consent was given is not the road you are now building, for the building of that road has become impossible by the action of the authorities of B and D.' " The above case was followed in *Lehigh Coal & Nav. Co. v. Inter-County St. Ry.*, 167 Pa. 75 (1895); *Rahn Twp. v. Tamaqua and Lansford St. Ry.*, 167 Pa. 84 (1895); *Pennsylvania R. R. v. Greensburg, Jeannette & Pittsburg St. Ry.*, 176 Pa. 559 (1896); *Pennsylvania R. R. v. Turtle Creek Valley Electric Ry.*, 179 Pa. 584 (1897); 28 Pitts. 12 (1897); *Wheeler & Boody v. Pennsylvania R. R.*, 194 Pa. 539 (1900); *Hannum v. Media, Middletown, Aston & Chester Electric Ry. Co.*, 200 Pa. 44 (1901); *Reading Co. v. Schuylkill Val. Traction Co.*, 14 Montg. 10 (1897); *Christie v. Philadelphia & Easton R. R.*, 8 North. 381 (1903); *Fidelity Ins. T. & S. D. Co. v. Phila. & Bristol Pass. Ry.*, 6 Dist. 737 (1897); *Conshohocken Ry. Co. v. Penn. R. R.*, 15 Pa. C. C. R. 445 (1894.)

²⁶ *Hannum v. Media, Middletown, Aston & Chester Electric Ry. Co.*, 8 Del. 242 (1901); 200 Pa. 44 (1901); reversing 8 Del. 91 (1900.)

²⁷ *Wheeler & Boody v. Pennsylvania R. R.*, 194 Pa. 539 (1900.)

street upon which another company was operating a street railway in constant daily use, and over whose tracks the former company had no right to run, the former company has no continuous route, and can therefore construct no part of its line.²⁸

Municipal Consent—From What Body and in What Manner Consent is Obtained.

314. The consent of boroughs and of cities of the second and third class may be manifested by special ordinance or by joint resolution.²⁹

The consent of the municipal authorities must be given in a proper and legal way. Thus the consent of the supervisors of the township to the construction of a street railway must be given at a regularly convened meeting, and the proceedings should be recorded in the township books kept by the township clerk. A paper signed by the supervisors in the pocket of a contractor, or of some officer of the street railway company is not the proper evidence of action by the township.³⁰

Where a borough council passes an ordinance at a meeting called by the president, giving consent to the construction of a street railway, and one hour and a half prior to the next regular meeting of council, which was two weeks after the meeting called by the president, the ordinance was placed in the hands of the burgess, who did not return it at the regular meeting, but did so on the following day with his veto, the veto is in time, and the ordinance fails.³¹

Consent obtained from supervisors is valid when they meet at their counsel's office at the county seat, and who, acting

²⁸ *Altoona Belt Line Extension Street Railway v. City Passenger Railway*, 209 Pa. 280 (1904.)

²⁹ *McHale v. Easton & Bethlehem Transit Co.*, 169 Pa. 416 (1895); *Larimer & Lincoln St. Ry. v. Larimer Str. Ry.*, 137 Pa. 533 (1900); *Babcock v. Scranton Traction Co.*, 1 Lacka. 223 (1895); see also *Athens, Sayre & Waverly Electric St. Ry. v. Sayre Borough* 156 Pa. 23 (1893.)

³⁰ *Pennsylvania Ry. Co. v. Montgomery Pass. Ry.*, 167 Pa. 62 (1895); *Tamaqua & Lansford St. Ry. Co. v. Inter-County Street Ry.*, 167 Pa. 91 (1895); *Johnstown & Scalp Level Turnpike Co. v. Johnstown Pass. Ry.*, 4 Dist. 594 (1895); *Union Street Ry. v. Hazleton & North Side Ry.*, 154 Pa. 422 (1893.)

³¹ *Lehigh Coal & Nav. Co. v. Inter-County St. Railway*, 167 Pa. 126 (1895.)

under their instructions, prepared a formal paper which embodied conditions relative to the care of the township highways.³²

Where a street railway company was granted the use of certain township roads and the consent to such use was obtained from the supervisors individually at different times, such consent was irregular, as it should be given by their careful, deliberate and joint action as a board at a meeting regularly convened, and the proceedings of such meeting should be recorded in the township book by the town clerk.³³

City councils are not the "local authorities" contemplated by Sec. 15 of the Act of 1889, who may consent to the use by a street railway company of a county bridge within the limits of a city.³⁴

Where a county bridge is located within the limits of a city, and the city has consented to the use of the bridge by a street railway company, the county commissioners cannot arbitrarily refuse the use of the bridge to the company, but they may require, as a condition of their consent, that the railway company shall bear the expense of strengthening the bridge, assume the cost of repairs, and pay reasonable rental. If, however, the county commissioners arbitrarily refuse their consent, the court may appoint an engineer to report as to what is necessary to strengthen the bridge for street railway traffic, and upon the filing of his report the court may permit the company to enter upon the bridge and strengthen it, and when this is made to appear to the satisfaction of the court, the company may use the bridge upon giving security to keep it in repair, pay the rental agreed upon, and perform the conditions upon which the municipal consent was given.³⁵

When the proper local and municipal authorities have given their consent to the use by a street railway of a highway of

32 *Meixell v. Northampton Central Str. Ry.*, 7 North. 274 (1900.)

33 *Union Street Ry. Co. v. Hazleton & North Side Electric Ry. Co.*, 15 Pa. C. C. R. 271 (1894); 3 Dist. 785 (1894); 6 Del. 22 (1894); 7 Kulp 313 (1894); 4 North. 250 (1894.)

34 *Venango County Commissioners v. Oil City Str. Ry.*, 3 Dist. 546 (1894.)

35 *Berks County v. Reading City Pass. Ry.*, 167 Pa. 102 (1895); *Larue v. Oil City Str. Pass. Ry.*, 170 Pa. 249 (1895); 26 Pitts. 125 (1895.)

which a county bridge forms a part, the county commissioners cannot arbitrarily restrain the use of the bridge by the company. If they do so refuse the matter may be controlled by the courts and the company permitted to proceed upon giving security that it will faithfully abide by the proper terms and conditions to be imposed by the authorities relating to the manner and use of the bridge, the repairs and the payment of rent, etc. These rules apply equally when the company proposes to lay an additional track.³⁶

Consent of the city councils of Philadelphia is not required for the construction of a passenger railway in Fairmount Park. Under the Act of April 14, 1868, the Commissioners of Fairmount Park have authority to grant a license to construct and operate a railway within the limits of the park. A bill in equity was brought in the name of the city of Philadelphia by the directions of city councils against the commissioners of Fairmount Park, to enjoin the building of a passenger railway within the confines of the Park. The Act of April 14, 1868, gave the commissioners power to construct all proper bridges, buildings, railways and other improvements therein, and the 20th Section gave them, in express terms, "authority to license the laying down and the use for a term of years, from time to time, such passenger railways as they think will comport with the use and enjoyment of the said park by the public, upon such terms as such commissioners may agree to."

Plaintiff contended that this particular grant of authority was unconstitutional and invalid because it violated Article 17, Sec. 9 of the Constitution, which declares that "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities." Thayer, P. J. said:

"This position is wholly untenable and arises out of a mistaken interpretation and confusion of terms. What is prohibited by the Constitution is the building of a *street* passenger railway in cities and boroughs without the consent of the local authorities. A passenger railway in Fairmount Park, where there are no streets but only country roads, is not a *street* pas-

³⁶ *Lawrence County v. New Castle Electric Str. Ry. Co. and New Castle Trac. Co.*, 8 Super. Ct. 313 (1898) ; 29 Pitts. 145 (1898.)

senger railway, and does not offend against the Constitution. The railway in the park is a passenger railway undoubtedly, but not a *street* passenger railway, and cannot be brought within the meaning of such terms by any fair reasoning, or by any canons of construction with which I am familiar. We are clearly of opinion that the commissioners have an undoubted right to grant such a license and that the city councils of Philadelphia have not the least pretense of authority to interfere with the exercise of that right in any manner whatever."³⁷

An electric railway company proposed to lay an electric road through Valley Forge Park. There was no evidence that the grounds in the park would be disturbed or that the trees would be cut or mutilated, or that there would be any interference with the fortifications upon the grounds. The Act of May 30, 1893, creating the Valley Forge Park, placed the possession of the grounds in the hands of the park commissioners who were to improve, preserve and maintain the park. The Act declared that the grounds were to be preserved for the enjoyment of the people of the State. The title and ownership of the land was in the State. In an action by the commissioners to restrain defendants from constructing their road, it was held that as the State, the abutting land owner, had refused at the quest of the commissioners to interfere, the court would not enjoin the construction of the railway at the instance of the commissioners.

Swartz, P. J. said: "The Act declares that the grounds are to be preserved for the enjoyment of the people of the State. To deny convenient access to the public is to defeat the purpose for which the park was established. If the public is to enjoy the grounds then cheap and convenient access should be afforded. We fail to see how the trolley road, under the evidence before us, will interfere with the commissioners in their efforts to improve, preserve and maintain the grounds."³⁸

³⁷ Philadelphia v. McManes, 16 Pa. C. C. R. 625 (1895); 4 Dist. 445 (1895); affirmed 175 Pa. 28 (1896.)

³⁸ Valley Forge Park Commission v. Phoenixville & Bridgeport Elec. Ry., 18 Montg. 142 (1902); 27 Pa. C. C. R., 109 (1902). As to the refusal of the Commonwealth to allow the Valley Forge Park Commission to litigate in the name of the Commonwealth, see Com. v. Phoenixville & Bridgeport Elec. Ry., 18 Montg. 139 (1902); 27 Pa. C. C. R. 123 (1902). As to

A consent of a supervisor to the construction of a street railway, if obtained by bribery, is invalid. Thus where the consent of the supervisor is obtained by a promise to provide employment for himself and his son at a stipulated price per day, the consent thus obtained is invalid. The consent of a borough council is invalid if it appears that the street railway company agreed to give employment to the members of the council.

If the consent is obtained by threats it will be invalid. Thus where the consent of a supervisor was extorted from him by the threat to have him arrested for fraudulently giving his consent to another company for a private consideration, followed by a promise to give him the same consideration, the consent is invalid.³⁹

Consent of the municipal authorities to the use of its streets by an electric railway company is invalid if obtained by bribery. Thus where the agent of a street railway company, which was endeavoring to obtain the right of way over certain streets, presented each of the councilmen with a pass and promised to pay them one hundred dollars when the ordinance granting the right of way was passed, the consent thus obtained is invalid.⁴⁰

Where a preliminary injunction has been granted to restrain the construction of a street railway in a borough, because the councilmen who had voted in favor of the ordinance granting the privilege to the railway company had received free passes, and had been paid certain expenses, the court may subsequently modify the decree so as to permit the construction of the railway where it appears that the councilmen surrendered their passes and subsequently, without any fraud or bribery, passed

railways in Gettysburg Battlefield, see *Gettysburg Battlefield Electric Ry. Case*, 13 Pa. C. C. R. 337 (1893). As to railways in State forest reservations, see Act of April 15, 1903, P. L. 200.

39 *Lehigh Coal & Nav. Co. v. Inter-County St. Ry. Co.*, 167 Pa. 75 (1895); *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. 120 (1895); *Tamaqua & Lansford St. Ry. Co. v. Inter-County St. Ry. Co.*, 167 Pa. 91 (1895); *Rahn Twp. v. Tamaqua & Lansford St. Ry.*, 167 Pa. 84 (1895.)

40 *Keogh v. Pittston & Scranton Str. Ry.*, 5 Lacka. 242 (1899); see s. c., 195 Pa. 131 (1900); 8 Lacka. 229 (1902.)

a second ordinance authorizing the use of the borough streets.⁴¹

The burden of proof is upon plaintiff to prove bribery against a municipal officer in the passing of an ordinance giving authority to a company to construct a street railway within the municipality.

Where an ordinance giving municipal consent to the construction of a street railway was declared invalid on account of bribery, and the ordinance was repealed and another ordinance of like effect passed two months later by the same council, the second ordinance will not be declared void without evidence of bribery directly connected with the official action of the councilmen in connection with the second ordinance.⁴²

A borough passed an ordinance giving its consent to the use of streets of a borough by a street railway. It appeared that the members of council who voted for and passed the ordinance were stockholders of the street railway or otherwise interested in it. It was held that as four out of the five councilmen who passed the ordinance were pecuniarily interested in procuring the grant from council, that the council was incompetent to make the grant.

The Court said: "Grant as we have already found, that these members of council acted, believing that it was for the general interest of the borough to pass the ordinance, nevertheless, they were trustees; they were acting in a quasi judicial capacity and were called on to judge and decide between the railway company and the borough. The municipality was entitled to the judgment of the councilmen uninfluenced by private interest. It did not have it. The right to enter the streets and occupy them as granted by the ordinance to this railway company is a most valuable privilege, as the law stands it virtually grants a monopoly to that company; it has given most valuable privileges with but slight corresponding obligation and when accepted by the company, as it was, if valid, it was a contract in which the councilmen were interested as much as though it had been a contract to grade and

41 *Keogh v. Pittston & Scranton Str. Ry.*, 195 Pa. 131 (1900); see also *Meixel v. Northampton Central St. Ry.*, 7 North. 274 (1901.)

42 *Keogh v. Pittston & Scranton Ry.*, 8 Lacka. 229 (1902.)

pave a public street, or a contract to pay the company an amount for entering or for erecting a water works, and we are unable to see that any substantial distinction can be drawn between such a grant and any other contract involving a matter of value. We are of the opinion that the council as constituted, with so many members interested was incompetent to make the grant contained in this ordinance."⁴³

Where a councilman was in the employ of one of the largest stockholders of a street railway company and had assisted in purchasing private rights of way, which the stockholder had agreed to furnish, it was held that the interest was not such as to invalidate an ordinance giving a street railway a franchise, and for which he had voted.⁴⁴

Municipal Consent—Conditional Consent.

315. A municipality in giving its consent to a street railway company to lay its tracks may impose conditions, and if consent has been given to a company on certain terms imposed by the ordinance, such ordinance does not exempt, on the ground of implied repeal, the railway company from liability to respond to the exactions of the police regulations imposed by the prior general ordinance.⁴⁵

Since railway companies are common carriers, and quasi public in their nature, the court will refuse to grant a preliminary injunction restraining the use of the railway on the ground that the company had not complied with certain conditions upon which municipal consent had been given for the construction of their tracks on a public road. Where the right of a railway company to occupy the highway is derived from agreement with the supervisors based

43 *Jolly v. Pittsburg, Neville Island & Coraopolis Ry. Co.*, 16 Pa. C. C. R. 1 (1895); 25 Pitts. 259 (1895); 26 Pitts. 331 (1895.)

44 *Robinson v. Wilkinsburg & East Pittsburg Str. Ry.*, 32 Pitts. 369 (1902). As to the effect of giving free passes to Councilmen, see *Plymouth Bor. v. Plymouth St. Ry.*, 10 Kulp 308 (1901.)

45 *McKeesport v. Citizens' Pass. Ry.*, 2 Super. Ct. 249 (1896). The condition may be that the grade of the street shall not be changed, *Perkiomen R. Co. v. Collegeville Electric St. Ry.*, 14 Montg. 13 (1897); or that the railway shall be laid in the centre of the street, *Wyoming Bor. v. Wilkes-barre & West Side Ry.*, 8 Kulp 113 (1895.)

upon conditions, it is not ultra vires for the company to consent to iron clad agreements; and a compliance with the terms of the grant as to the laying of the tracks, etc., will be rigidly enforced.⁴⁶

A street railway company must comply with the conditions imposed upon it when municipal consent was given; if it fails to do so, its operations will be enjoined on application of the municipality.⁴⁷

A street railway company which had entered into a contract with a borough to build a railway in a street is not relieved from its contract because of the fact that for a distance of 750 feet the company was confined to the use of about eleven feet only in width of the highway, especially where the evidence is not conclusive that the railway could not have been constructed and operated on the street.⁴⁸

Municipal authorities may impose, as a condition of their consent, that a street railway company shall run its cars through the main street of the borough to a certain point on the tracks of another company, and if subsequently such other company withdraws the use of its tracks, the consent of the borough may be withdrawn.⁴⁹

Where a street railway company is given the privilege of occupying streets of a borough on condition that it shall build a certain branch, shall run its cars in a manner specified and shall not lease its road without the consent of the borough, and it fails to perform these conditions, a court of equity, at the suit of the borough, will enjoin the further use of the streets by the company.⁵⁰

The municipality may impose as a condition of its consent, that all damages done by grading in connection with the construction of the railway shall be paid by the company to the abutting owner.⁵¹

⁴⁶ *Loyalsock Township v. Montoursville Pass. Ry.*, 7 Dist. 291 (1898.)

⁴⁷ *Conshohocken Burgess v. Conshohocken Ry. Co.*, 18 Montg. 95 (1901.)

⁴⁸ *Montooth Borough v. Brownsville Ave. St. Ry.*, 206 Pa. 338 (1903.)

⁴⁹ *Ashland Borough v. Ashland & Centralia Elec. Ry.*, 27 Pa. C. C. R. 346 (1902.)

⁵⁰ *Minersville v. Schuylkill Electric Ry. & Pottsville Union Traction Co.*, 26 Pa. C. C. R. 101 (1902.)

⁵¹ *May v. Carbondale Traction Co.*, 167 Pa. 343 (1895.)

The consent of the municipality may be given with a condition, such for instance, as a provision in the ordinance that a certain designated rate of fare shall be charged, and that a certain per cent. of the dividend shall be paid to the municipality. The ordinance may also provide that "this ordinance shall not go into effect until the company shall accept the same by its proper officials."⁵²

Where a street railway company violates a condition in an agreement of supervisors that it will not charge a rate of fare in excess of the amount specified, abutting owners who have no contract with the railway company as to the rate of fare, cannot join with the supervisors in a bill to restrain the company in collecting a greater rate of fare than that stipulated in the contract with the supervisors. The abutting owners in such a case have no interest different from that of the general public.⁵³

A specific condition in an ordinance of a borough granting an electric passenger railway company authority to operate its road, which provides that the company shall pay to the borough a certain percentage of its gross earnings realized in operating its line, both within and without the borough is not ultra vires and will be enforced. Even if such a condition were ultra vires as to the percentage earned outside the borough, the company having accepted the ordinance cannot defend on that ground, as the ordinance was an entirety and its acceptance was a condition precedent. The fact that the ordinance was repealed does not affect the case, since the company continued to operate its line over the borough streets.⁵⁴

The condition of local consent may be that the railway shall be completed within fourteen months, and this is so, although the Act of May 14, 1889, provides that the company shall complete its road within two years after the consent of the local authorities. In such a case time is of the essence of the con-

⁵² Allegheny City v. Millville, Etna & Sharpsburg Street Ry. Co., 159 Pa. 411 (1893.)

⁵³ Mill Creek Twp. v. Erie Rapid Transit Street Railway, 209 Pa. 300 (1904.)

⁵⁴ Carlisle Borough v. Cumberland Valley Elec. Pass. Ry., 8 Dist. 497 (1899); 22 Pa. C. C. R. 221 (1899.)

tract, and if the company fails to complete its road within the fourteen months, the local authorities have a standing in equity to enjoin the further construction of the road.⁵⁵

If the agreement with the township provides that the franchise and all rights thereunder shall be null and void and of no effect, if the railway is not built within a time specified, no action on the part of the township to complete the forfeiture is required, if the railway is not built within the time stated.⁵⁶

Where a borough grants to a street railway company the right to the use of a street in the borough, coupled with the express condition that the right shall be forfeited if the company does not within one year build a certain extension, the borough may compel a removal of the tracks from the street, if within one year, the extension has not been constructed.⁵⁷

Where a borough ordinance granted a right of way over the streets of a borough to a street railway company, with the proviso that if they fail to complete the railway within a specified time the authority granted would be revoked and the company failed to complete the road within the specified time, the revocation on the part of the borough must be the action of the council, moving by due resolution or ordinance. Such a proviso does not execute itself as until the borough authorities take advantage of the condition, the rights of the company continue.⁵⁸

Where an ordinance of a city, granting the right to a passenger railway company to extend and operate their road over certain streets, contained a provision that if the company failed to complete their route within two years, their rights should

55 *Plymouth Twp. v. Chestnut Hill & Norristown Ry.*, 168 Pa. 181 (1895); 11 Mont. 89 (1895); overruling s. c., 15 Pa. C. C. R. 442 (1894); 4 Dist. 8 (1894); 6 Del. 39 (1894); 12 Lanc. 36 (1894); 10 Mont. 158 and 209 (1894); 4 North. 289 (1894.)

56 *Mill Creek Twp. v. Erie Rapid Transit Street Ry. Co.*, 209 Pa. 300 (1904.)

57 *Minersville Borough v. Schuylkill Elec. Ry.*, 205 Pa. 394 (1903); affirming 26 Pa. C. C. R. 101 (1902); 11 Dist. 539 (1902); *Hannum v. Media, &c. Ry. Co.*, 8 Del. 91 (1900); *Upper Providence Twp. v. Trappe & Limerick Ry. Co.*, 17 Montg. 167 (1900.)

58 *Archbald Borough v. Carbondale Trac. Co.*, 3 Dist. 751 (1894); 15 Pa. C. C. R. 159 (1894.)

be forfeited, and the company failed to so complete its route, the city having allowed the company, without objection, years after the time had expired to lay their tracks and string their wires, cannot restrain by injunction the construction of the tracks on the ground that they had forfeited their rights by reason of their not having completed their tracks within the required time.⁵⁹

A street railway company was chartered to build a continuous road extending through four municipalities, and the consent for the construction of the road was secured from all the municipalities and abutting land owners. The supervisors of one of the townships in their contract giving their consent, stipulated as follows: "It is further agreed that said company shall begin its work of construction within one year and have the road completed and in operation within the period of two years from the date of this grant." Defendant began within one year the construction of its road in one of the townships. It was held that the beginning of construction of the road within one year in one of the townships was a compliance that the work should commence within one year, although no work was done in the township enacting such stipulation within one year from the grant.⁶⁰

Where a borough in granting consent, requires the company to use guard wires over the trolley wire, but delays for a considerable time to enforce this condition, a bill for an injunction to restrain the operation of the cars will be dismissed if the company within a reasonable time will erect the wires.⁶¹

Where a city granted to a street railway company a franchise on certain conditions, and the company has hung a feed cable along its poles, carefully insulated, an injunction will lie to restrain the mayor of the city from tearing it down on the ground that the company has forfeited its rights.⁶²

⁵⁹ *Scranton Ry. v. Scranton City*, 5 Lacka. 250 (1899.)

⁶⁰ *Upper Providence Twp. v. Trappe & Limerick Elec. Str. Ry.*, 8 North. 93 (1901); 17 Montg. 167 (1901.)

⁶¹ *Conshohocken Borough v. Conshohocken Ry.*, 206 Pa. 75 (1903); affirming 18 Mont. 95 (1903.)

⁶² *Pittsburg & Charleroi Str. Ry. Co. v. Monongahela City*, 17 York 70 (1903); 12 Dist. 544 (1903); 33 Pitts. 275 (1903.)

A street railway company was authorized by the municipality to lay its tracks, subject to certain conditions. After the road had been operated for about a year, the company hung a feed cable along its poles, carefully insulated, which the mayor of the city summarily removed on the ground that the ordinance giving municipal consent to the company had become null and void by reason of the company not having complied with all its terms. It was held on bill in equity for an injunction that the feed cable was not a nuisance such as the mayor could abate on sight, neither could he declare the rights of the company forfeited without action by councils. An injunction was accordingly granted to the company.⁶³

The municipality may impose as a condition that the street railway company shall pave or repave the streets occupied by it, and it may stipulate that the municipal council may forbid the running of cars until the condition is fully complied with.⁶⁴

A franchise was granted a street railway company on condition that a portion of the street should be kept paved and cars run regularly thereon. Upon a bill in equity to enforce the ordinance, a decree was made giving the company three months to put the street in order and one month in which to put in operation a reasonable number of cars from 6 a. m. to 11 p. m. each day, and on failure to comply its rights should be forfeited.⁶⁵

Where a street railway company was authorized by an ordinance of a borough to lay tracks along one of the borough streets, subject to their paving the entire street and laying the tracks according to plans to be drawn by the borough engineers, work to be begun by a certain date, and such plans were not drawn up until after that date, but prior thereto the company's engineer submitted plans, including specifications for paving, to councils, which were discussed and marked approved by the burgess, and work was immediately begun under these plans, the action of the borough amounted either to an appro-

63 *Pittsburg & Charleroi Str. Ry. Co. v. Monongahela City*, 33 Pitts. 275 (1903.)

64 *Philadelphia v. 13th and 15th Sts. Pass. Ry. Co.*, 169 Pa. 269 (1895); affirming s. c., 15 Pa. C. C. R. 29 (1894); 3 Dist. 468 (1894).

65 *McKeesport v. Pittsburg Railways Co. et al.*, 33 Pitts. 377 (1903); 12 Dist. 541 (1903.)

val of the plans of the borough engineer or a waiver of their rights to require different paving.⁶⁶

Municipal Consent—Estoppel of Municipality.

316. Where township officers have stood by and permitted the expenditure of large sums of money in the construction of a street railway upon the roads, they cannot afterwards demand that the railway shall be torn up or its use enjoined.⁶⁷

Where a street railway company with full knowledge of the municipal authorities constructed a "Y" at great expense, the municipality cannot after several years maintain an injunction to abolish the "Y" on the ground that the company had not the consent of the borough to construct the track. Having had full and complete knowledge of the company's acts, the borough must be held by its actions to have ratified them.⁶⁸

A street railway company was authorized by an ordinance of the city to lay its tracks in the center of a street. The tracks were, however, not laid in the center, but upon the side of the street in obedience to the direction of the street committee and city engineer, and the change of location was accepted by the city. No ordinance of the city authorized this change of the tracks. It appeared, however, that several clauses of the ordinance granting the right to the railway company to lay its tracks showed a clear intention to put the street committee and city engineer in full control of the construction. It was held that as the change of location was authorized by the street committee, who were made the general agents of the city to superintend the construction and accepted by the city, the location of the railway at the side of the street was lawful.⁶⁹

A street railway company will not be disturbed in the construction of a bridge to avoid an existing grade crossing where

66 *Pitcairn Borough v. Wilmerding & Pitcairn Str. Ry. & Monongahela Str. Ry.*, 32 Pitts. 205 (1901.)

67 *Canton Township v. Washington & Canonsburg Ry. Co.*, 34 Pitts. 142 (1903); following *Penna. R. R. v. Mont. Co. Ry.*, 167 Pa. 62 (1895.)

68 *Plymouth Borough v. Plymouth Str. Ry. & Wilkesbarre & Wyoming Valley Trac. Co.*, 10 Kulp 308 (1901.)

69 *Collins v. Carbondale Trac. Co.*, 5 Dist. 18 (1895.)

the plans were approved by the township, and the supervisors fail to show any departure from the agreement entered into between the township and the railway company, in the absence of any evidence to show that the established grade of the highway will destroy the convenient use of the public road.⁷⁰

A railway built without the valid consent of the municipality, but which is subsequently authorized by ordinance, is lawful as the consent relates back to the time of the construction.⁷¹

While a street passenger railway company chartered after the Constitution of 1874, cannot change its motive power so as to add an additional servitude to the streets without municipal consent, still, if the company changes its motive power from horses to electricity without the municipal consent and operates its road by electricity for several years without such consent, a private citizen in an action of trespass for personal injuries caused by the fright of a horse cannot allege that the electric road and its necessary appliances were a nuisance in itself. In such a case the municipal consent will be presumed.⁷²

Municipal Consent—Injunction.

317. A preliminary injunction will not issue to restrain a borough from interfering with a street railway company in restoring "T" rods or cross rods where the same have been torn out by the borough, where the granting of said preliminary injunction would disturb the statu quo of the parties, the preservation of which is the very object and purpose of such an injunction.⁷³

A preliminary injunction will not issue when it will work great injury to the defendant and inconvenience to the public; while its refusal pending a hearing on the merits, would work but slight prejudice to the complainant.⁷⁴

70 *Plymouth Township v. Conshohocken Ry. & Schuylkill Valley Trac. Co.*, 18 Montg. 100 (1902.)

71 *Kleinman v. Philadelphia Co.*, 34 Pitts. 113 (1903.)

72 *Potter v. Scranton Traction Co.*, 176 Pa. 271 (1896.)

73 *Schuylkill Traction Co. v. Shenandoah Borough*, 23 Pa. C. C. R. 222 (1900); 9 Dist. 77 (1900.)

74 *Loyalsock Township v. Montoursville Pass. Ry.*, 7 Dist. 291 (1898.)

County commissioners are the proper authorities to maintain a bill in equity for an injunction to restrain the illegal occupancy of a county bridge.⁷⁵

Where a railroad company, under an agreement with a borough, builds an overhead bridge as a part of the public highway, the title to the bridge vests in the borough, and the borough may permit a street railway to lay its tracks on the bridge. The railroad company, however, has a standing in equity to enjoin the street railway company from operating its line until the bridge is strengthened sufficiently safely to bear the weight of street cars.⁷⁶

The Commonwealth alone can raise the question whether the variance from the chartered route is greater than necessary or whether the charter route itself is open to objection.⁷⁷

Municipal Consent—Attachment for Contempt.

318. Where a street railway company was given, by ordinance, the right to lay its tracks at a certain distance from the east side of the street, and was restrained by the court from placing its tracks elsewhere on the street, an attachment for contempt will not be issued for an alleged violation of the decree of the court where there is an uncertainty as to the location of the street lines.⁷⁸

Municipal Consent—Taking up of Tracks by Company.

319. A street railway company which has received permission from a borough to lay two tracks on a street may, in the absence of any provision to the contrary in the ordinance giving consent, take up one track and remove it entirely, but can-

75 *Venango County Commissioners v. Oil City Str. Ry.*, 3 Dist. 546 (1894.)

76 *Pennsylvania R. R. v. Greensburg, Jeannette & Pittsburg St. Ry.*, 176 Pa. 559 (1896.)

77 *Minnich v. Lancaster, Mechanicsburg & New Holland Railway*, 24 Pa. C. C. R. 312 (1900); 10 Dist. 126 (1900); 7 North. 305 (1900); 17 Lanc. 385 (1900); 6 Lacka. 275 (1900.)

78 *Bridgewater Borough v. Beaver Valley Traction Co.*, 12 Dist. 479 (1902); 47 Pa. C. C. R. 328 (1902.)

not change the location of the other without the consent of the borough.⁷⁹

Landowner's Consent—In General.

320. A street railway cannot be constructed on a country road without the consent of all of the abutting owners. A distinction is made in this respect between urban and suburban highways. In a city or borough the municipal authorities may impose the additional servitude upon the streets without the consent of the abutting owners, but in townships the consent of the supervisors does not carry with it the consent of the abutting owner, and any single abutting owner whose consent has not been obtained, may enjoin the construction of the road.⁸⁰

It was not the intention of the legislature by the Act of May 14, 1889, P. L. 211, to provide for long lines of transportation connecting widely separated cities and towns by electric railways traversing country roads. The intent of the legislature was to provide street railways for cities and towns. There is a marked difference between a city and a country road. The former is in the exclusive possession of the municipality, which may use the foot way as well as the cart way for any urban servitude without further compensation to the land owners. In the case of the latter the public has only a right of passage, while the owner is entitled to the possession of his land for all other purposes. It follows from this that the consent of township authorities justifies an entry upon a public road so far as the public is concerned, but the supervisors of the township

⁷⁹ Shamokin Borough *v.* Shamokin & Mount Carmel Elec. Ry., 196 Pa. 166 (1900.)

⁸⁰ Pennsylvania R. R. *v.* Montgomery County Pass. Ry., 167 Pa. 62 (1895); Lehigh Coal & Nav. Co. *v.* Inter-County Street Ry. Co., 167 Pa. 75 (1895); Rahn Twp. *v.* Tamaqua & Lansford St. Ry. Co., 167 Pa. 84 (1895); Thomas *v.* Inter-County St. Ry. Co., 167 Pa. 120 (1895); Pennsylvania R. R. *v.* Greensburg, Jeannette & Pittsburgh St. Ry., 176 Pa. 559 (1896); Reading Company *v.* Schuylkill Valley Trac. Co. & Citizens' Pass. Ry. Co., 14 Montg. 10 (1897); Jackson *v.* Slate Belt Elec. St. Ry., 7 North. 286 (1900); Willis *v.* Erie City Pass. Ry. & Erie Electric Motor Co., 188 Pa. 56 (1898); Fidelity Insurance, Trust & Safe Deposit Co. *v.* Philadelphia & Bristol Pass. Ry., 6 Dist. 737 (1897); Pennsylvania R. R. *v.* Conshohocken Ry., 15 Pa. C. C. R. 454 (1894); 4 Dist. 12 (1894); 10 Montg. 209 (1894.)

have no power to bind property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. "The carriage of passengers through the township on their journey from one city or borough to another by rail is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways, is immaterial both to tax payers and to land owners along the route traveled except as the adoption of one or the other of these modes of transportation may affect the township roads or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway they speak as the representatives of those who build, and those who use the roads, but not as the representatives of the private property over which the roads pass. The street railway companies cannot reach the property owners either through 'the local authorities,' or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy."⁸¹

In townships of the first class, street railway companies cannot be constructed without the consent of the abutting property owners.⁸²

A street railway company which has operated a horse railway on the roadbed of a turnpike company has the corporate power, when it constructs an electric railway, to enter into a contract with the turnpike company to compensate the latter for the increased burden upon its property.⁸³

The Act of May 14, 1889, which gives street railway companies the right to condemn a turnpike or turnpikes on making compensation to the owner or owners thereof, does not include

⁸¹ *Pennsylvania Railroad v. Montgomery County Passenger Railway*, 167 Pa. 62 (1895.)

⁸² *Dempster v. United Trac. Co.*, 205 Pa. 70 (1903.)

⁸³ *Little Saw Mill Valley Turnpike Co. v. Federal & Pleasant Valley Pass. Ry.*, 194 Pa. 144 (1899.)

the right as to the soil under the turnpike as against abutting owners.⁸⁴

An injunction may issue to restrain a railway company from constructing and operating their railway over a portion of a turnpike road, the fee of which is owned by complainants. If such action were permitted, it would impose upon the land of the complainants a servitude not anticipated when the land was thrown open to the use of the traveling public and the turnpike road.⁸⁵

As the consent of the abutting property owners in townships is essential to the construction of a street railway, a property owner on the line of an extension in a city through which an extension of the railway passes may challenge, under the Act of June 19, 1871, the right of the company to build an extension because of the lack of consent to build its entire road, and the burden of proof is on the company to show that it has secured all the necessary consents. If the right to build an extension disconnected from its charter route is denied, it is likewise bound to show that it has not abandoned any of its extensions necessary to connect it with its charter route.⁸⁶

Electric railways are within the purview of the Act of June 19, 1871, P. L. 1360.⁸⁷

The Act of June 19, 1871, relating to the power of courts of equity to inquire into the rights and franchises of corporations in suits by private individuals, was not intended to do away with or change the general principles on which equitable relief is administered. Notwithstanding the imperative "shall" in the Act, an injunction is not to be awarded unless a proper case for injunction be made out in accordance with the principles and practice of equity.⁸⁸

Where a street railway company has secured the municipal

84 *Hinnershitz v. United Trac. Co.*, 206 Pa. 91 (1903.)

85 *Philadelphia & Trenton R. R. v. Philadelphia & Bristol Pass. Ry.*, 6 Dist. 269 (1897.)

86 *Hannum v. Media, Middletown, Aston & Chester Elec. Ry.*, 200 Pa. 44 (1901); reversing 8 Del. 91 (1900.)

87 *Harrisburg & Mechanicsburg Elec. Ry. v. Harrisburg, Carlisle & Chambersburg Turnpike Co.*, 15 Pa. C. C. R. 389 (1894); 4 Dist. 17 (1894); *Pittsburg Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899.)

88 *Becker v. Lebanon & Myerstown Str. Ry.*, 188 Pa. 484 (1898.)

consent, and of all the owners of abutting property, a railroad company cannot question the right of the street railway company to operate its road merely on the ground that it is injured by a diminution of its passenger traffic by the construction of the street railway.⁸⁹

Landowner's Consent—Who Are Abutting Owners.

321. A railroad company owning lands in fee, which are not a part of its roadway, is an abutting owner whose consent is necessary to the construction of a street railway on a public road. "To cross a railroad and to cross the lands of a railroad company are not convertible terms. Unless the lands of a railroad company held in fee can fairly be said to be a part of its roadway where it crosses the highway, the right of the owner, though a railroad corporation, as against the asserted right of a street railway company to lay its tracks upon a suburban road, is as perfect as that of a private individual."

If it is doubtful whether the land owned in fee by the railroad company is, or is not a constituent part of the roadway, the street railway company will not be enjoined from laying its tracks on the public road.⁹⁰

A street railway company proposed to lay its track along a public highway upon land owned by a railroad company and used exclusively by it for railroad purposes. The railroad company crossed the highway by means of an overhead bridge, and owned land on each side of the bridge for about a distance of two hundred feet. Plaintiffs contended that being the owner in fee of the land abutting on the public highway, its consent to the occupation of the highway by the defendants is necessary. It was held that the railroad company's consent was not necessary.

Weand, J., said: "We are unable to find that plaintiff stands in the same position as a private individual whose con-

⁸⁹ Pennsylvania R. R. v. Greensburg, Jeannette & Pittsburg St. Ry. 176 Pa. 559 (1896.)

⁹⁰ Pennsylvania R. R. Co. v. Inland Traction Co., 25 Super. Ct. 115 (1904); see Trenton Cut-off R. R. v. Newtown Electric Ry., 8 Dist. 549 (1899); Northern Central Ry. Co. v. Harrisburg, &c. Ry. Co., 177 Pa. 142 (1896.)

sent must first be obtained; in respect to a mere crossing a railroad is not an abutting land owner to a passenger railway—*Pennsylvania Company v. Greensburg Elec. Ry. Co.*, 176 Pa. 559. What is this but a mere crossing of the right of way, except that the right of way includes land on either side of the tracks of plaintiff company. In *Northern Central Ry. Co. v. Harrisburg & Mechanicsburg Elec. Ry. Co.*, 177 Pa. 142, it was held that 'under the Act of May 14, 1889, a street railway company had no right to construct its road across the lines of a steam railroad company without the consent of and against the protest of the latter at a point where its roadway is not crossed by a public highway.' In that case the attempt to cross was not on the highway, but at a different place, which is not the fact here, for the crossings under the bridge by the defendant company is on the public highway, and the land of plaintiff is the approach to the bridge; but the whole length of the ground is as much the point of crossing as is the bridge or the ground beneath it. *Canal Company v. Railway Co.* 10 Super. Ct., 413, is not in point; there the railway company was the owner in fee of the canal bridge which it was proposed to cross. In *Trenton Cut-Off R. R. v. Newtown Str. Ry. Co.*, 8 Dist. 549, Judge Yerkes held that the defendant company was confined to the point of crossing, but could not go beyond the mere crossing without consent. In this case, however, the plaintiff's road along the highway is an entirety and as much a part of the crossing as that on which the tracks are laid or the bridge built. All the land of the railroad company was acquired by reason of the necessity of building a bridge over the turnpike. It is one essential part of the crossing, no matter what its extent, and we are not running counter to the spirit or true meaning of any decision of the Supreme or Superior Court in holding that plaintiff's consent is not necessary, there being no appropriation of any of the plaintiff's land to the exclusive use of defendant company."⁹¹

The ownership of land in fee by a railroad company, upon which rests its superstructure, gives it no right to exclude sub-

⁹¹ *Pennsylvania R. R. v. Inland Trac. Co. and Phila. & Lehigh Valley Trac. Co.*, 18 Montg. 130 (1902); affirmed 25 Super. Ct. 115 (1904.)

sequent grantees of the Commonwealth from the use of the highway or public road which crosses it.⁹²

A canal company holding title to its property in fee simple is such an owner of land as to make the consent of the canal company necessary before a street railway company can cross the canal property of the plaintiff upon the public highway and overhead bridge used by the general public.

The defendant, a street railway company, under its charter, secured the consent of municipalities and landowners, with the exception of the plaintiff, and constructed a street railway, to be operated by electricity between Lewisburg and Watson-town. When the construction of defendant's line had extended to within two miles of the canal bridge, notice was served by the canal company upon the defendant not to use the said canal bridge for passenger railway purposes. The defendants disregarded the notice and continued the work, and after bill in equity filed by plaintiff, a preliminary injunction was awarded. The defendants filed an answer and the preliminary injunction was dissolved and it was ordered that the defendant company be permitted to cross the bridge upon strengthening it.

It was held on appeal that the canal company had a property right in the land and bridge which cannot be taken and appropriated by the railroad company and that the canal company, owning the land contiguous to the bridge and that covered by it in fee simple, had the right to withhold its consent; it was therefore ordered that the railroad company be perpetually enjoined from occupying or using the property of the canal company.⁹³

An injunction will not be awarded to restrain a street railway company from building their road on the side of a turn-pike because of the dissent of the owner of the land on the

92 *Williams Valley R. R. v. Lykens & Williams Valley Str. Ry. Co.*, 192 Pa. 552 (1899); reversing s. c., 1 Dauph. 225 (1898); *Pennsylvania R. R. v. Greensburg, &c. Ry. Co.*, 176 Pa. 559 (1896.)

93 *Pennsylvania Canal Company v. Lewisburg, Milton & Watson-town Passenger Ry. Co.*, 10 Super. Ct. 413 (1899); reversing s. c., 20 Pa. C. C. R. 550 (1898); 7 Dist. 244 (1898.) Judgment of Superior Court affirmed by an equally divided Court in 203 Pa. 282 (1902.)

opposite side, where it appears that it has the consent of the township authorities, the turnpike company and the owner of the land on the side it is to run.⁹⁴

Plaintiff was an abutting land owner, holding title to the middle of a turnpike and sought to restrain a street railway company from constructing any part of its railway on any part of the land of the plaintiff, or repairing any part of said turnpike. The court held that as the plaintiff owned only the fee to one side of the street, his title extends only to the middle of the street, and he has therefore, no right by reason of the occupation of the other side before damages of any kind have been suffered by him, to restrain by injunction the construction of the street railway on that side. He can, however, restrain by injunction, the construction of any part of the railway on any of his property.

In such case plaintiff is not guilty of laches because six years before a former company, of which the defendant company is the assignee, entered upon his side of the turnpike without objection from him and slightly graded an intended road-bed on which, as then constructed, the defendant company proposed to lay its ballast, ties and rails.⁹⁵

Landowner's Consent—Consent of Cities and Boroughs Not Necessary.

322. The construction and operation of a street railway operated by means of an overhead electric system does not im-

94 *North Pennsylvania R. R. v. Inland Traction Co.*, 18 Montg. 49 (1902); affirmed in 205 Pa. 579 (1903). Brown, J., said: "No additional servitude has been imposed upon their land, which extends only to the middle of the highway. The route of the appellee along the turnpike is over the lands of others, who have consented to its location there. In the case of the occupation of a township road, maintained by supervisors, the rule goes no further than that while an injunction, if applied for in time, will issue at the instance of an abutting owner, to protect his own land from an additional burden on it, it is none of his concern that his neighbors on the opposite side of the road consent to the use of their lands by a passenger railway company, so long as, from such use, no injury results to him. The protection by injunction to which each landowner is entitled is confined to his own property."

95 *Minnich v. Lancaster, Mechanicsburg & New Holland Ry. Co.*, 24 Pa. C. C. R. 312 (1900); 10 Dist. 126 (1900); 7 North. 305 (1900); 17 Lane. 385 (1900); 6 Lacka. 275 (1900.)

pose such an additional servitude on the land as to entitle an abutting property owner to compensation therefor.⁹⁶

A municipality, unless restrained by its charter from so doing, may authorize the use of its streets by the tracks of street railway companies and the operation of cars thereon; and such companies may lawfully use and occupy such streets under such authority. The operation of a street railway, whether by horse car, cable or electricity does not impose an additional burden or servitude on the land as to entitle the owner either to compensation therefor or an injunction to restrain such occupation.⁹⁷

If at any time the owner of property abutting on a street has occasion for the presence of vehicles in front of his property on the street to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes, and if in such exercise of his right the passage of street cars is impeded, the street cars must wait.⁹⁸

Where plaintiffs are property owners and tax payers in a borough and are subjected to some special injury by reason of the construction of a street railway, they have a right in equity to contest the right of the street railway to build its road.⁹⁹

Landowner's Consent—Estoppel.

323. While the consent of abutting landowners must be obtained prior to the construction of a street railway on a country road, still if such owners stand by and permit, without objection, the expenditure of large sums of money in the construction of a railway, they cannot afterwards demand that the railway shall be torn up and its use enjoined.¹⁰⁰

⁹⁶ *Pennsylvania R. R. v. Montgomery Co. Ry.*, 167 Pa. 62 (1895); *Patterson v. Pittston City*, 8 Kulp 530 (1897.)

⁹⁷ *Patterson v. Pittston City*, 8 Kulp 530 (1897.)

⁹⁸ *Patterson v. Pittston City*, 8 Kulp 530 (1897.)

⁹⁹ *Jolly v. Pittsburg-Neville Island and Coraopolis Ry. Co.*, 16 Pa. C. R. 1 (1895); 25 Pitts. 259 (1895); 26 Pitts. 331 (1895.)

¹⁰⁰ *Pennsylvania R. R. v. Montgomery County Pass. Ry.*, 167 Pa. 62 (1895); *Chester Traction Co. v. Phila., Wilm. & Balto. R. R. & Union Ry. Co. v. P., W. & B. R. R.*, 6 Del. 481 (1896); *Willis v. Erie City Pass. Ry. & Erie Electric Motor Co.*, 188 Pa. 56 (1898); *Gaw v. Phila. & Bristol Pass. Ry.*, 6 Dist. 740 (1897.)

If a street railway company constructs its railway on a highway without an abutting property owner's consent, and also without any objection from him, it may continue the railway as constructed, but it has no right to construct an additional switch, or remove and enlarge one previously constructed in front of the land of a non-consenting owner so as to increase the damages thereto, without the consent of the owner.¹⁰¹

If a street railway company lays its tracks upon a public road and constructs embankments which interfere with the access to property abutting on the road, the company will not, after the expiration of six years and after the railway has become a great public convenience, be enjoined from continuing and maintaining the embankments, where it appears that just compensation can be made to the land owner for all injury done to him.

"Street railway companies are not endowed with the right of eminent domain, because they do not need it. They are modern local conveniences, the location and construction of which are subject to the will of the public they are intended to serve. This will is expressed through the local authorities. Such companies cannot force themselves into neighborhoods where they are not wanted. When permission is given them to occupy a public street, they acquire thereby not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street to the grade of which they are required to conform. They have no right to grade or in any manner interfere with the access to private property from the highway or so to construct the road as to interfere with public travel or disturb adjacent land owners."¹⁰²

Where a street railway company lays its tracks upon a turnpike road without the consent of an abutting property owner,

101 *Taylor v. Erie City Pass. Ry.*, 186 Pa. 120 (1898.)

102 *Heilman v. Lebanon & Annville Street Ry. Co.*, 180 Pa. 627 (1897), per Williams, J.; *Becker v. Lebanon & Myerstown Str. Ry.*, 188 Pa. 484 (1898); 195 Pa. 502 (1900); *Pennsylvania R. R. v. Montgomery Co. Pass. Ry.*, 167 Pa. 62 (1895.)

and such railway is in full operation, an injunction will not be granted at the instance of such property owner to restrain the further use of the road. His remedy is an action of trespass for damages. He is not entitled to maintain ejectment, since he is not entitled to possession.¹⁰³

Where a company lays a single track along a portion of its route on a turnpike road in such a manner as to indicate plainly an intention to build a double track road, and the single track is operated for two years, and the company then proceeds to lay a second, a bill not filed by land owners until more than one-third of the new track had been constructed, will be dismissed, because of laches, but where the element of laches is absent and the single track was not erected in such a manner as to indicate an intention to build a double track road, an injunction will be granted.¹⁰⁴

Where the plaintiff, a suburban land owner, granted the right of way over the public road in front of his property to a street railway company by a voluntary deed dated and acknowledged, and fifteen months after denied the validity of the deed, the defendant, having in the meantime obtained the consent of all the abutting property owners along the route and of the municipal authorities of the different townships through which the road passed, and begun the construction of its road and incurred large obligations and made expenditures upon the belief that consent was procured for a continuous route, an injunction will not be granted to the land owner to restrain the company from occupying the highway in front of his property.¹⁰⁵

In *Shimer v. Easton & Nazareth Street Ry. Co.*, the plaintiff in November promised the agent of the street railway company that he would interpose no objections to the construction of a street railway in front of his property, and agreed to sign a written acknowledgment which, however, was never presented to him. In June following, the consent of the required

103 *Becker v. Lebanon & Myerstown Str. Ry.*, 188 Pa. 484 (1898); 195 Pa. 502 (1900.)

104 *Hinnershitz v. United Trac. Co.*, 206 Pa. 91 (1903); *Kleinman v. Philadelphia Co.*, 34 Pitts. 113 (1903.)

105 *Meixell v. Northampton Central Str. Ry.*, 7 North. 274 (1900.)

municipal authorities and other property holders having been obtained, the work of construction on the different sections of the line commenced; railway ties were purchased and laid along the highway; the erection of a power house and equipment of plant begun; and a loan by mortgage negotiated from a trust company and part of the bonds it secured sold. Although the plaintiff knew that work was going on, no action was taken by him until he filed a bill for an injunction on July 16. It further appeared from the uncontradicted evidence, that the bill was filed at the instance and for the benefit of the accredited agents of another company projecting a branch into the same territory and upon promise of indemnity against costs and expenses. It was held that the plaintiff by his actions was estopped from invoking relief by injunction.¹⁰⁶

Where a street railway company located its road in front of plaintiff's property in March, began its construction in July, and ran the cars from December until the following November, a bill then filed for an injunction will be dismissed by reason of plaintiff's laches.¹⁰⁷

A property owner who consented to an entry upon his land by a street railway company is estopped from setting up failure of consent of all the abutting property owners as a ground for an injunction.¹⁰⁸

A street railway company which constructed its line on a highway, with the consent of the abutting owner, will not be permitted to construct its line on a highway abutting on land subsequently acquired by the consenting owner without obtaining from him his consent as to the after-acquired land.¹⁰⁹

Where a turnpike company which had authority, under its charter, to construct a plank road and open it for any width not exceeding forty feet, but has failed to designate the boundary of its road, a railroad company which constructed a railroad across the turnpike, resting its overhead bridge on

¹⁰⁶ 7 North. 249 (1900.)

¹⁰⁷ *Westhaeffer v. Lebanon & Annville Str. Ry.*, 3 Dist. 56 (1893.)

¹⁰⁸ *Christie v. Phila. & Easton St. Ry. Co.*, 8 North. 381 (1903); 12 Dist. 508 (1903.)

¹⁰⁹ *Taylor v. Erie City Pass. Ry.*, 186 Pa. 120 (1898.)

trestling or abutments erected within the limits of the roadway and filled in back of them without any objection by the turnpike company, will not be restrained by a borough which has obtained control of the turnpike company by virtue of condemnation proceedings from maintaining the abutments. "The officers of the plank road knew and must have known what the railroad company was doing, as their acts were unequivocal assertions of ownership. They expended hundreds and perhaps thousands of dollars in the construction of abutments and filling in back of them and they have maintained them from 1858 to the present time. The officers of the plank road company looked on in silence, made no objections and acquiesced, and having failed to designate the boundaries of its road, the railroad company designated the boundary thereof on its own land and the plank road company, by its silence and acquiescence, gave its consent thereto."¹¹⁰

Landowner's Consent—Injunction to Restrain Construction.

324. Under the Act of June 19, 1871, a property owner in a city on the line of a street railway has a standing in equity to question the authority of a street railway to construct its road in front of his property.¹¹¹

Railroad companies incorporated under the general railroad Act of 1868, but so constructing their lines as to operate the same with electric power, and not able to carry on what is commonly known as a general railroad business, have not the right of eminent domain and a bill in equity will lie under the Act of June 19, 1871, at the instance of a land owner to restrain such railroad from entering on his land for railroad purposes until the company can show whether or not it is constructing the kind of railroad contemplated by the Act of 1868.¹¹²

An injunction is not of right. It will not be issued when

¹¹⁰ *Blakely Borough v. Delaware & Hudson Canal Co.*, 2 Lacka. 59 (1896), per Gunster, J.

¹¹¹ *Hannum v. Media, Middletown, Aston & Chester Elec. Ry.*, 8 Del. 242 (1901); 200 Pa. 44 (1901); reversing 8 Del. 91 (1900.)

¹¹² *Kincaid v. Mahoning Valley R. R.*, 25 Pa. C. C. R. 545 (1901.)

upon a broad consideration of the situation of all the parties in interest good conscience does not require it.¹¹³

The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is until the merits can be heard, and where there is no apparent ground for apprehension that existing conditions will be disturbed, such injunction will be dissolved.¹¹⁴

Equity will relieve against a nuisance caused by the laying of tracks by an electric railway on a turnpike, at the instance of an abutting owner where special damages are shown. But the mere fact that the construction of a railway upon abutting lands will divert additional travel over complainant's fee, is no ground for equitable relief.¹¹⁵

A bill in equity may be maintained by an owner of property abutting upon a turnpike road against a street railway company which has constructed an embankment in front of his house so as to obstruct the approach to the house. Such a bill cannot be dismissed on demurrer because of the plaintiff's laches in filing it.¹¹⁶

An injunction to restrain the construction of a trolley track will not be granted when it appears that the plaintiff's principal purpose in purchasing the property, the prior owner of which had verbally consented to the construction of the road, was to harass and embarrass the defendant company.¹¹⁷

A street railway company sought to build a railway over a certain route and obtained the consent of all the land owners except the plaintiff. A boulevard company, incorporated for the purpose of constructing a boulevard over the same route,

113 *Pennsylvania Railroad Company & Pittsburgh, Virginia & Charleston Railway Co. v. Glenwood & Dravosburg Electric Street Railway Co. and Second Avenue Traction Co.*, 184 Pa. 227 (1898); *Messner v. Lykens & Williams Valley Str. Ry.*, 13 Super. Ct. 429 (1900); *Christie v. Phila. & Easton Str. Ry.*, 8 North. 381 (1903.)

114 *Reading & Temple Elec. Ry. v. Reading & Southwestern Str. Ry.*, 11 Dist. 30 (1901.)

115 *Philadelphia & Trenton R. R. v. Philadelphia & Bristol Pass. Ry.*, 6 Dist. 487 (1897.)

116 *Westhaeffer v. Lebanon & Annville Ry. Co.*, 163 Pa. 54 (1894.)

117 *Messner v. Lykens & Williams Valley Str. Ry. Co.*, 13 Super. Ct. 429 (1900.)

its officers being the same as those of the traction company, took possession of plaintiff's land, it having a right of eminent domain, and proceeded to construct a highway under the Act of 1895, and admitted its intentions of laying flat rails upon the boulevard, as it expected that in the future the railway company would obtain the consent of the plaintiffs to operate its line, but disclaimed any intention of permitting the railway company or any other company to run its cars over the road until they obtained plaintiff's consent. The evidence showed that the laying of the rails would not injure the roadway and that it is not forbidden by the Act of 1895.

Upon a bill in equity by plaintiffs, it was held that the continuance of a preliminary injunction enjoining the laying of tracks upon the boulevard was properly refused.¹¹⁸

A street railway company will not be enjoined from building its road at the instance of an individual where, because of the refusal of a property owner to consent to the occupancy of his land it has failed to obtain a continuous route. Such a break in the route would, however, warrant a consenting party in withdrawing his consent to the road passing over his property.¹¹⁹

A bridge company constructing a greatly needed public bridge for the use of the general public in accordance with its charter, will not be enjoined from building the bridge because a street railway company may have inspired the formation of the bridge company for the purpose of obtaining passage across a ravine otherwise unobtainable because of the objection of property owners.¹²⁰

The extent of the injury in occupying a turnpike is not deemed important; if the invasion of the land is without right and the injury consists in having fixed upon it for all time the rights given to the railway company, equity will interpose as the remedy at law is inadequate.¹²¹

118 *Redman v. Monongahela Boulevard Co. & Monongahela Str. Ry. Co.*, 189 Pa. 437 (1899.)

119 *Philadelphia & Trenton R. R. v. Philadelphia & Bristol Pass. Ry.*, 6 Dist. 487 (1897.)

120 *Oliver v. Thompson's Run Bridge Co.*, 197 Pa. 344 (1900.)

121 *Minnich v. Lancaster, Mechanicsburg & New Holland Ry.*, 24 Pa. C. C. R. 312 (1900); 10 Dist. 126 (1900); 7 North. 305 (1900); 17 Lanc. 385 (1900); 6 Lacka. 275 (1900.)

Where a street railway company has constructed its road on an abutting land owner's side of a turnpike road without his consent, he may maintain an injunction to prevent it from subsequently moving the tracks nearer to his property on the ground of convenience or necessity for its more efficient operation.¹²²

An injunction will not be granted to restrain a street railway company from constructing its track around the curve of the plaintiff's property at a distance less than eight feet from the curb, where the evidence leaves it in doubt whether the tracks can be so constructed as to admit a sufficient driveway for carriages between the tracks and the curb.¹²³

Where a street railway company, under an agreement with the township supervisors removes its poles from four feet from the side of the street to the street line, it is not such an additional burden upon the land of an abutting owner as to entitle him to redress in equity.¹²⁴

Where it is clearly shown that it is the intention of a railroad company, incorporated under the Act of 1868, to construct a street passenger railway on the streets of a borough, an abutting property owner is entitled, under the Act of June 19, 1871, to an injunction to restrain the building of the road.¹²⁵

A preliminary injunction will not be granted unless the party applying for it shows a clear right to the same, and an immediate and urgent danger of irreparable injury.¹²⁶

An injunction is a purely preventive remedy and will not issue for past injuries; anticipated dangers or speculative apprehensions will not warrant interference by injunction.¹²⁷

¹²² *Minnich v. Lancaster & Lititz Elec. Ry. Co.*, 21 *Lanc.* 36 (1903.)

¹²³ *Guffey v. Pittsburg, Oakland & East Liberty Ry.*, 27 *Pitts.* 141 (1896.)

¹²⁴ *Kleinman v. Philadelphia Co.*, 34 *Pitts.* 113 (1903.)

¹²⁵ *Mory v. Oley Valley Ry. Co.*, 199 *Pa.* 152 (1901); *Pennsylvania R. R. v. Bridgeport R. R.*, 11 *Mont.* 73 (1895.) But an injunction will not be granted where the company is proceeding regularly and there is no evidence of an intention to do an illegal act. *Rocky Glen Water Co. v. Scranton & Northeastern R. R.*, 7 *Lacka.* 237 (1901); see *Kincaid v. Mahoning Valley R. R.*, 25 *Pa. C. C. R.* 545 (1901.)

¹²⁶ *Northern Central Ry. v. Walworth*, 7 *Dist.* 766 (1898); 12 *York* 125 (1898); *Schuylkill Traction Co. v. Shenandoah*, 9 *Dist.* 77 (1900.)

¹²⁷ *Schuylkill Traction Co. v. Shenandoah Borough*, 9 *Dist.* 77 (1900); 23 *Pa. C. C. R.* 222 (1900.)

A mere surmise or apprehension that a steam railroad will under color of its charter, build a street passenger railway is not sufficient to warrant an injunction.¹²⁸

Where a railroad company, incorporated under the Act of April 4, 1868, is proceeding regularly under the statute to possess itself of its roadbed under the right of eminent domain, the mere suspicion that it is intended to be operated in connection with a passenger railway company, and the fact that the railroad company is located upon private property, parallel to and directly alongside a public highway and between the terminus of two passenger railway companies, will not warrant a court of equity awarding an injunction to restrain the construction of the railroad because of an alleged intent to evade a former decree of the court whereby the construction of a passenger railway on the turnpike between the two termini was enjoined, where the evidence does not sustain the allegation of an attempt to evade the former decree.¹²⁹

Street railways have not the power of eminent domain, and no corporation organized for the purpose of engaging in the street railway business can acquire such power under a mere pretense of being a steam railroad company; but where the evidence does not establish such unlawful intention and it is shown that it is the purpose of the company to build a railroad within the meaning of the general railroad acts, and not a street railway, then it is acting within the rights conferred by the Act incorporating it and has the power of eminent domain.¹³⁰

If an abutting property owner is injured by a change of grade, which was authorized by the municipality for the purpose of allowing an electric railway company to relay its tracks at a new and elevated grade, an injunction will not be awarded to restrain the municipality from changing the grade, as the

128 *Willow Grove & Germantown Plank Road Companies v. Philadelphia, Glenside & Willow Grove Ry. Co.*, 17 Montg. 66 (1900); 14 York 187 (1900.)

129 *Gaw v. Bristol & Bridgewater R. R.*, 196 Pa. 442 (1900); affirming 8 Dist. 605 (1899); 22 Pa. C. C. R. 332 and 465 (1899); 7 North. 61 (1899.)

130 *Rocky Glen Water Co. v. Scranton & Northeastern R. R.*, 7 Lacka. 237 (1901.)

abutting property may be compensated in a court of law by damages.¹³¹

Landowner's Consent—Action for Damages.

325. A street railway company, not having the right of eminent domain, is liable for a special injury to another's property by the lawful operation of its works on its own land.¹³²

If a street railway company wilfully and maliciously lays its tracks upon a road against the protest of an abutting owner, the latter may maintain an action of trespass for the injuries sustained, and the street railway company cannot demand that the damages shall be assessed upon the same basis as if they were done in the lawful exercise of the right of eminent domain. In such a case the owner may bring successive actions, where after one action there has been additional injury by the continuance of the operation of the railway.¹³³

Where a street railway company locates and constructs its railway on a public road without the consent of the abutting property owners, the measure of damages for which it is liable is the depreciation in the value of the property as the result of the change of grade and the construction and maintenance of the railway. Its liability is the same as if it had obtained the consent of such owners and given bonds to compensate them for such injuries to their property as its location and construction might inflict.¹³⁴

Where a street railway company obtained a grant of a right of way over certain property and covenanted to grade and pave a portion of the right of way not occupied by its tracks for a roadway, and subsequently the railway company, by reason of its failure to gain the municipal consent, abandons the location, and places no tracks or burden upon the land, the owner is only entitled to nominal damages, and is not entitled to recover from the railway company the cost of grading,

131 *Patterson v. Pittston City*, 8 Kulp 530 (1897.)

132 *Rogers v. Philadelphia Trac. Co.*, 182 Pa. 473 (1897.)

133 *Becker v. Lebanon & Myerstown Street Ry.*, 25 Super. Ct. 367 (1904.)

134 *Thompson v. Citizens' Trac. Co.*, 181 Pa. 131 (1897); 27 Pitts. 405 (1897); *Osborne v. Delaware County & Phila. Elec. Ry.*, 9 Super. Ct. 632 (1899); 7 Del. 375 (1899.)

paving and curbing. "Having parted practically with nothing, they have lost nothing, and are entitled to recover nothing more than the actual loss. Clearly they are not entitled to have their property intact, and at the same time recover the full amount of the compensation to which they would have been entitled had the street railway been built upon their premises."¹³⁵

In an action by a land owner to recover damages to his land by the construction of a street railway along a highway, it is error to charge plaintiff in the demanding of damages with the general appreciation of property in the neighborhood, caused by the construction of the railway.¹³⁶

A street railway, when constructed, must conform to the established grade of the street. If it does not, it creates an unlawful obstruction to adjoining property owners, whose consent otherwise is not required to the servitude in cities and boroughs.¹³⁷

Where a street railway company which had permission by ordinance to lay its tracks in the centre of a street, laid them upon the side thereof, in obedience to the direction of the street committee and city engineer, who were the agents of the city, for the construction of the railway, and by so laying them, changed the grade of the street, the street railway company is liable to the plaintiff for the change of grade of the street.¹³⁸

A street railway company who were directed by the supervisors of a highway to lay its tracks in a trench so as to conform to the grade of the street, when changed, is not liable if an infant trips over a mound between the traveled part of the road and the car tracks about two feet from the latter, and falls upon the track and is injured by a passing car.¹³⁹

When repairs on a turnpike are under the charge of a street railway company, although paid for by the turnpike company,

135 Per Potter, J., in *Hays v. Wilksburg & East Pittsburgh Str. Ry.*, 204 Pa. 488 (1903); reversing 32 Pitts. 216 (1902.)

136 *Shimer v. Easton Ry. Co.*, 205 Pa. 648 (1903.)

137 *Jackson v. Slate Belt Elec. Str. Ry.*, 7 North. 286 (1900.)

138 *Collins v. Carbondale Traction Co.*, 5 Dist. 18 (1895.)

139 *Miller v. Lebanon & Annville Str. Ry.*, 186 Pa. 190 (1898.)

it is the duty of the railway company to give notice to the public of the dangerous condition of the road.¹⁴⁰

Landowner's Consent—Turnpike Companies.

326. A street railway company cannot lay its tracks upon the bed of a turnpike company without payment or security for the payment of just compensation to the turnpike company. The Act of May 14, 1889, Sec. 17, in so far as it failed to provide for proper security is unconstitutional.¹⁴¹

Completion of Circuit.

327. Where, under its charter, a street passenger railway company has power to complete its circuit by laying a track on a street occupied by another company, the latter company cannot by suit for an injunction attack collaterally the charter power of the former company and thus prevent the laying of the tracks.¹⁴²

Although the legislature in the exercise of the right of eminent domain, may take the franchises and property engaged in a public use and apply them to another public use, a statute which confers upon one corporation for profit the right to appropriate the property of another to exactly the same public uses merely for the convenience and profit of the younger corporation is unconstitutional.

In Philadelphia, Morton and Swarthmore Street Ry. Co.'s Petition, 203 Pa. 354 (1902),¹⁴³ in which the question of the right of a younger franchise to take possession of and appro-

¹⁴⁰ *Wagner v. Pittsburgh & West End Pass. Ry.*, 158 Pa. 419 (1893.)

¹⁴¹ *Harrisburg, Carlisle & Chambersburg Turnpike Road Co. v. Harrisburg & Mechanicsburg Electric Ry.*, 177 Pa. 585 (1896); *Philadelphia, Morton & Swarthmore Str. Ry. Co.'s Petition*, 203 Pa. 354 (1902.)

¹⁴² *Thirteenth and Fifteenth Sts. Pass. Ry. v. Southern Pass. Ry.*, 15 Pa. C. C. R. 145 (1894); 3 Dist. 337 (1894.)

¹⁴³ Mr. Justice Dean, in an able discussion of the acts, said: "Section 14 of the Act of 1889 provided that, any passenger railway incorporated under this Act shall have the right to use such portion of the track of any other company already laid down as may be necessary to construct a circuit upon its own road at the end thereof. The length of the track to be used, which shall be used only with the consent of the local authorities, borough or township, in no event shall exceed 500 feet in length of single track. Before any such use occurs, compensation shall be paid to the corporation owning the track laid,' etc.

"The only material change made by the amendment in the Act of 1889 is

priate the franchise and property of an older one first arose, it was held that the Act of May 14, 1889, P. L. 211, Sec. 14, as amended by the Act of May 21, 1895, P. L. 93, which gave to a street railway subject to the payment of damages the right to use 2,500 feet of the tracks of another street railway company was unconstitutional.

in the words: 'The length of track to be used in no event shall exceed 500 feet in length of single track.' In the amendment this reads: 'In no event shall exceed 2500 feet of street or highway.'

"Both companies were incorporated under the Act of 1889, but the appellant company was organized before the amendment of May 21, 1895, the appellee company subsequently; both have their being under the Act of 1889. The constitutionality of Sec. 14 with its amendment is denied. Can its constitutionality under the settled law be sustained? We are in no doubt as to just what power the legislature intended to confer by these Acts; it was a clear grant of a right to the younger to enter upon the easement of the older company and take possession of 2500 feet of its tracks, poles and wires thereafter to use them for its corporate purposes. It was not material that this possession was not to be exclusive; in whatever light it is viewed it was an authority to appropriate to a certain extent the franchise and property of the older company. The authority of the legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use cannot be questioned. Whether it be expedient or wise for the legislature to exercise this authority to take property for public use is purely a political question and one solely for the legislature. But whether the use to which it is sought to appropriate the property authorized to be taken is a public use, is a judicial question for the determination of the Courts: *West River Bridge Co. v. Dix*, 6 Howard (U. S.) 507; *Pittsburg v. Scott*, 1 Pa. 309; *Jessup v. Loucks*, 55 Pa. 350; *Stewart's Appeal*, 56 Pa. 413; *Philadelphia, etc., Railroad Co.'s Appeal*, 120 Pa. 90; *Edgewood R. R. Co.'s Appeal*, 79 Pa. 257; *Commonwealth v. Pa. Canal Co.*, 66 Pa. 41. In all these cases the Court decided whether the appropriation of the franchise of the older under the right of eminent domain was a new and enlarged use for the benefit of the public and therefore such a 'public use' as brought it within the meaning of the Constitution.

"In no case have I been able to find in any of the States, a judicial judgment upholding the right of one corporation for profit to appropriate the property of another to exactly the same uses merely for the convenience and profit of the younger corporation. Take the case before us; both these companies were chartered under the Act of 1889, with precisely the same character of organization, the same privileges and immunities, for the same purpose, the carrying of passengers; the same motive power, electricity; the same restricted right of domain, the highway or turnpike, both are corporations for profit to be made from the patronage of the public for the same service.

In proceedings under the Act of May 14, 1889, to condemn the use of a portion of the track of another company, the court will not consider the right to occupy more than five hundred

"Where is the public use enlarged or where is the public benefit enhanced by the younger corporation taking possession of the rails, poles and wires of the elder? It may be conceded that the new corporation is benefited by the immediate possession of a roadway ready for traffic without the delay and vexation incident to building for itself; and the 2500 feet may be the most remunerative part of the older franchise; a traffic may have been attracted to it by years of enterprise and business tact. The only effect of this 14th section and the amendments is to transfer the property of one private corporation to a new one for the same public use, both being transporters of passengers for profit. The transaction is not in substance different from the transfer of one farmer's land to his neighbor under an assumed right of eminent domain, which has not the shadow of warrant in the Constitution.

"To illustrate, let us suppose another case which, if this claim be sustained, might easily become a real one. The Pennsylvania, Philadelphia & Reading, and Baltimore & Ohio are all steam railroads for passenger and freight traffic entering the city of Philadelphia with terminal stations near its centre; for five miles and more each has at immense expense through years of enterprise built up a large and probably remunerative traffic on the few miles of road next their terminal stations. Suppose another road or roads organized as they may, and can easily be under the General Railroad Act of 1868, with an eastern terminal at Philadelphia; they can approach to within a few miles of the city without serious difficulty; but the cost of entering by reason of the very great value of property would necessarily be very large. Would the legislature under the assumed right of eminent domain, pass an amendment to the Act of 1868 authorizing the new company to take possession jointly with the old company of five miles of the older company's tracks, that it might for the benefit of the public secure an entrance into the city? It is obvious that such an amendment would not be founded on any necessity of or even convenience to the general public but on the desire of and the temptation to the new company from a business point of view to take possession of the franchise and property of the old one, a desire which could only be attained by the assumed exercise of the power of eminent domain in favor of the new corporation by the State. It would be a perversion of, or a tyrannical exercise of the power of eminent domain by the sovereign not for a public use but for the private and corporate gain of the new corporation. It would not be sustained under the fundamental law of any of our States; it could not be sustained under ours; yet I am unable to discover wherein the supposed case materially differs in its controlling facts from the one before us.

"If it be argued that by the progress in methods of transportation and the increasing wants of the people an imperative necessity for increased

feet of the track of the other company, or the constitutionality of the Act, until the report is made.¹⁴⁴

Plaintiff, under the Act of April 8, 1859, P. L. 429, operated

means of rapid communication for both business and social purposes has arisen, we grant it; but how is the necessity to be met? Not certainly by a violation of the rights of property guaranteed by the Constitution but by a reasonable and long exercised right of eminent domain. Surely there are other streets and highways besides the narrow strip already occupied by the appellant; other land wide enough on which appellee can lay its rails and erect its poles. If it be said that under the Act of 1889 the domain of the street railway is restricted to the highway, that is no answer; the same power which restricts can enlarge; the same assumed power which gives the right to take property already appropriated under a prior grant, can lawfully confer domain without restriction on property not so appropriated; in fact, there is no serious obstacle in the way of multiplying and constructing electric railways to meet every reasonable public demand for them. If the necessary cost of construction be an insuperable obstacle unless property rights of like corporations be disregarded, then there is not that public use to be met which within the meaning of the Constitution warrants the granting of eminent domain; a reasonable expectation of public patronage will always tempt investment of capital. If, however, under the law the investment can be put in constant peril by the demands of newer corporations for the property of the older, it may well be doubted whether in the end the public would not suffer from the refusal of capital to invest in improvements for public use. Capitalists will take the risk that in the indefinite future, their franchise and property may be taken to answer the public necessities and demands for a newer and more improved method of travel and communication; it is doubtful whether they would readily take the risk of the appropriation of their franchise and property by every organization instituted for precisely the same purpose under the General Act of 1889; for there would be no limit to the extent of the appropriation, except the cupidity of the new company and the will of the legislature; it was first 500 feet, then 2500, or nearly half a mile; next it may be a mile or more. Nor is there any limit to the number of railway companies organized subsequently which under the pretense of public use may take possession of the property of the older one; as many as choose to organize under the Act can claim the same right."

See also *Com. v. Uwchlan Street Ry. Co.*, 203 Pa. 608 (1902.)

The above decision does not affect railways previously organized and by whom liabilities have been incurred, except so far as to deprive them of the use of streets occupied by other companies: *Easton & Belvidere St. Ry. v. Blue Ridge Traction Co.*, 9 North. 1 (1903.)

144 *Philadelphia, Morton & Swarthmore Str. Ry. v. Chester, Darby & Philadelphia Ry.*, 25 Pa. C. C. R. 30 (1901); 8 Del. 206 (1901); see s. c., 203 Pa. 354 (1902.)

a railway on Fifteenth and Thirteenth streets, from Carpenter street to Columbia avenue, and on Columbia avenue, and Carpenter street from Thirteenth to Fifteenth streets. The defendant company was incorporated under the Act of May 14, 1889, P. L. 211, and signified its intention of laying a railway track on Carpenter street, between Thirteenth and Fifteenth streets. The plaintiff prayed for an injunction to restrain the defendant from laying any track or operating the same on Carpenter street between Thirteenth and Fifteenth streets.

The court in refusing the injunction said :

"It is clear that the right of the Thirteenth and Fifteenth Streets Passenger Railway to build and operate a railway on Carpenter street, between Thirteenth and Fifteenth streets was not exclusive and was only to enable it to make a circuit. It was incorporated to build and operate a railway on Thirteenth and Fifteenth streets primarily, the use of Carpenter street and Columbia avenue being incident to its use of the other two streets, and by the Act of April 4, 1868, it was granted as the city grew, the right to construct tracks north and south from Columbia avenue and Carpenter streets, respectively, upon Thirteenth and Fifteenth, as the said streets shall be opened from time to time and to complete their circuit, upon any street running east or west that may be opened. We therefore cannot see how the plaintiffs are injured by the construction of a track between Thirteenth and Fifteenth streets by the defendant on Carpenter street in order to complete its circuit. In the present case the Thirteenth and Fifteenth Streets Passenger Railway Company took its charter subject to the right of other railway companies to use its tracks for the purpose of completing a circuit."¹⁴⁵

The Act of May 14, 1889, relating to the incorporation of traction companies, does not give the exclusive right to a traction company incorporated thereunder in the use of a bridge across a river; under the above Act and the Act of May 21, 1895, providing for the use by one company of a part of the tracks of another, a second street railway company may be

¹⁴⁵ Thirteenth and Fifteenth Streets Pass. Ry. v. Southern Pass. Ry., 15 Pa. C. C. R. 145 (1894); 3 Dist. 337 (1894.)

chartered to run its tracks over a bridge already occupied by another company.¹⁴⁶

A municipality has the power to license a street railway company to cross one of its bridges, and it has the same power to grant this privilege to another company in order to allow it to complete a circuit. Upon a bill filed by complainant to enjoin another street railway company from laying its tracks upon a bridge already occupied by complainant's tracks, it was held that the injunction should be refused.

Thayer, P. J., said: "The whole question at issue between the parties turns upon the proper construction of the proviso contained in the fourth Section of the Act of May 14, 1889—the General Passenger Railway Act—under which the defendants were incorporated. This provision declares that 'No extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter except as hereinafter provided. The exception mentioned in the proviso relates to the right given in the fourteenth Section of the Act to use 500 feet of the track of another company in order to complete a circuit. The object of the proviso plainly was to prevent the duplication or multiplication of tracks upon the same streets. The complainants, by the city's permission, were allowed to carry their tracks across the bridge for the purpose of completing a circuit. It would be a strange thing indeed if that permission were now to be made the foundation of an exclusive right in the complainants, and to deprive the the city of its rights to extend a similar privilege to another company which is not a competitor of the complainants, which pursues a totally different route, and traverses other streets than those occupied by the complainants. The municipality gave the same license to the defendants to occupy the bridge which it had given to the complainants. It had the same right to give it to the one as to the other, and the title of the defendants is as good as that of the plaintiffs, unless the city and the defendant alike are deprived of their rights by a blind misapplication of the proviso of the Act of 1889. The grant of the city to the defendants to use the bridge for the same pur-

¹⁴⁶ Com. ex rel. v. Sycamore Str. Ry., 3 Dauph. 95 (1900); 30 Pitts 333 (1900.)

pose for which the complainants use it, viz., the completion of the circuit, does not transgress the proviso; and the defendants by availing themselves of it, have not in any respect violated the proviso for they have not by so doing 'constructed an extension or branch' upon a street previously occupied by the plaintiff company within the meaning of the words of the proviso. The defendants are entitled to make use of the bridge for the purpose of crossing the river in the manner authorized by their charter and the city ordinances and nothing in the fourth section of the Act of 1889 prevents their doing so."¹⁴⁷

Extensions.

328. The filing by a street railway company in the office of the Secretary of the Commonwealth of an exemplification of the record of the adoption of an extension, as required by the Act of May 14, 1889, amended by the Act of June 7, 1901, is a condition precedent to the construction of the extension.¹⁴⁸

Where a street railway company organized under the Act of June 7, 1901, P. L. 514, has resolved upon an extension, has had its resolution recorded and has duly filed an exemplification of this record, it has done everything required of it to establish an extension, and is immediately vested with a franchise. The provision in the 14th section of the Act of June 7, 1901, merely postpones "the right to construct" for thirty days after the date of filing the exemplification. If therefore another street railway company is incorporated within the thirty days to construct a railway over the same streets, its charter is void, and will be forfeited by quo warranto proceedings instituted by the State.¹⁴⁹

Letters patent will not be issued to a street railway company under the Act of May 14, 1889, P. L. 211, as amended by the Act of June 7, 1901, P. L. 514, where after the filing of the

¹⁴⁷ Hestonville, Mantua & Fairmount Pass. Ry. v. Forty-second Str. & West Park Ry., 4 Dist. 343 (1895.)

¹⁴⁹ Com. v. Uwchlan Street Ry. Co., 203 Pa. 608 (1902); affirming 11 206 Pa. 40 (1903.)

¹⁴⁹ Com. v. Uwchlan Street Ry. Co., 203 Pa. 608 (1902); affirms 11 Dist. 236 (1902); 8 North. 229 (1902); Butler Traction St. Ry. Co.'s Case, 28 Pa. C. C. R. 135 (1903.)

articles of association, but before they have been acted upon, either to approve or disapprove them, an extension is filed by an existing company covering the same route as that indicated in the articles of association filed.¹⁵⁰

No authority is given in the Act of June 7, 1901, to the Secretary of the Commonwealth to determine whether the filing of the exemplification of the minute extending the route of a street railway company will confer a right to such route to which for any reason the company cannot lawfully obtain a right. Such a question is a judicial one, to be determined by the court when it arises. The filing of an exemplification is a purely ministerial act, and if formally correct is entitled to be filed.¹⁵¹

Under the Act of May 14, 1889, a street railway company which has filed an extension of its road over streets to which municipal consent had been refused, has no standing to contest the right of a company subsequently filing an extension covering the same streets, to whom municipal consent had been given to occupy those streets.¹⁵²

Where a railroad company, incorporated under the Act of June 7, 1901, has promptly applied for municipal consent, it has an exclusive privilege in the highways named in its charter for the period of two years allowed for construction and a rival company incorporated prior to the Act of June 7, 1901, will be restrained from building extensions on such route during such time.¹⁵³

A street railway company which had notice of the intention of another company to build an expensive bridge to enable it to connect with the tracks of the former, and to secure a joint use

¹⁵⁰ Rock Glen Str. Ry., 10 Dist. 592 (1901); 4 Dauph. 205 (1901); West Chester Ry. v. Rock Glen Ry., 25 Pa. C. C. R. 558 (1901.)

¹⁵¹ West Chester Str. Ry. Co. v. Griest, 8 North. 367 (1903); 6 Dauph. 13 (1903); 27 Pa. C. C. R. 427 (1903); 12 Dist. 282 (1903); see Rock Glen Str. Ry., 10 Dist. 592 (1901); 4 Dauph. 205 (1901); West Chester Ry. v. Rock Glen Ry., 25 Pa. C. C. R. 558 (1901.)

¹⁵² Reading & Temple Elec. Ry. v. Reading & Southwestern Str. Ry., 11 Dist. 30 (1901); see Easton & Belvidere St. Ry. v. Blue Ridge Traction Co., 9 North. 1 (1903.)

¹⁵³ Coatesville & Downingtown Str. Ry. Co. v. West Chester Ry. Co., 206 Pa. 40 (1903.)

of the tracks that it claims, cannot after permitting the work to be completed without objection, come into equity to question the latter's right to a joint use of the tracks.¹⁵⁴

Although a street railway company having a charter route and legally adopted extensions may begin the construction at any point most convenient to itself, beginning at an extension is not the natural and usual way, and when their right is challenged, the company must show affirmatively its intention to complete the whole and that its work on the branch is a bona fide beginning of the entire operation. A company may not proceed to construct an extension, and in the meantime abandon or indefinitely defer the carrying out of its original franchise.¹⁵⁵

Under Section 18, of the Act of May 14, 1889, P. L. 211, a street railway company may construct a crossing over another street railway in a curved line and then prolong its tracks a reasonable distance along the street parallel with the other railway to reach the opposite point of crossing. Such crossing is not an extension or branch on a street already occupied.¹⁵⁶

Sidings and Switches.

329. Where an ordinance of a borough confers upon a street railway company the right to lay their tracks upon the centre of an avenue, the company may, under the ordinance, construct in addition to the main line, such switches or sidings as may be necessary for the handling of its business and operation of its road. Such a provision in an ordinance should not be strictly construed, but means that the middle of the street rather than the sides thereof is to be occupied.¹⁵⁷

A street railway company which has secured the consent of the road commissioners to lay a single track, will not be per-

¹⁵⁴ *People's Pass. Ry. v. Union Pass. Ry.*, 15 Pa. C. C. R. 498 (1894); 3 Dist. 717 (1894.)

¹⁵⁵ *Hannum v. Media, Middletown, Aston & Chester Electric Ry.*, 200 Pa. 44 (1901); reversing 8 Del. 91 (1900.)

¹⁵⁶ *Citizen's Pass. Ry. v. East Harrisburg Pass. Ry.*, 164 Pa. 274 (1894.)

¹⁵⁷ *Wyoming Borough v. Wilkes-Barre & West Side Ry.*, 8 Kulp 113 (1895); 6 Del. 278 (1895); *Wilkes-Barre v. Coalville Pass. R. R. Co. & Wilkes-Barre & Wyoming Valley Trac. Co.*, 8 Kulp 298 (1896.)

mitted under the guise of building switches, to lay a double track.¹⁵⁸

If a street railway company is authorized to construct "necessary turnouts," its power is not exhausted until both the railway and necessary turnouts are built, and is not affected by an attempt on the part of the land owners and road commissioners to withdraw their consent as to unconstructed switches and turnouts.¹⁵⁹

A finding of fact that a switch 360 instead of 1,000 feet long as contracted for by a street railway company, is all that will be necessary for a company's use and is within the meaning of "necessary turnouts" in an ordinance, will not be reversed by the Supreme Court where the finding is in accordance with the weight of the evidence.¹⁶⁰

In an action against a street railway company to recover damages for cracks in the wall of a building which stood about eighty feet from the track, and which were alleged to have been caused by the continuous bumping of cars over a switch, a non-suit is properly entered where there is no evidence that the bumping of cars was the real cause of the cracks, and no evidence of any improper construction of the switch or of any negligence of defendant.¹⁶¹

Divergence from Route.

330. A street railway company, chartered under the Act of May 14, 1889, may diverge for a short distance from its chartered route where the conformation of the surface, or the positions of streams make it necessary in order to avoid discomfort or danger to the traveling public, or also to avoid grade-crossings or for any other reason amounting to necessity or great public convenience. "The occasion for such divergence and its extent are questions of location, and the decision of them primarily is within the discretion of the railroad company. If the variance from the chartered route is greater than is necessary, or the charter route is itself open to objection, the

158 *Willis v. Erie City Pass. Ry.*, 188 Pa. 56 (1898.)

159 *Willis v. Erie City Pass. Ry.*, 188 Pa. 71 (1898.)

160 *Willis v. Erie City Pass. Ry.*, 188 Pa. 56 (1898.)

161 *Starr v. North Side Trac. Co.*, 193 Pa. 536 (1899.)

Commonwealth alone can be heard to make it in the interest of the general public."¹⁶²

Under the Act of June 7, 1901, a street railway company may deflect its line from a point where a turnpike road over which it has a right of way, crosses a railroad and reach over private lands through which it has acquired a right of way a point some distance from said crossing and there cross the railroad at a height of twenty-two feet above its right of way.¹⁶³

Consent was given on July 23, 1898, by certain township supervisors to an electric street railway company to construct a line of railway, and in February, 1903, the line was constructed at a cost of about \$20,000. On Sept. 11, 1903, a bill in equity was filed by the road supervisors to enjoin said company from operating the road, claiming that the road as constructed had diverged from the charter route. The court held that under the Act of May 14, 1889, the company had a right to diverge a short distance "when the conformation of the surface or the position of streams made it necessary in order to avoid discomfort or damage to the traveling public," and if the divergence from the charter route is greater than is necessary, the Commonwealth alone can be heard to make it in the interest of the general public.¹⁶⁴

Crossings.

331. Street railways are within the meaning of the Act of June 19, 1871, P. L. 1360, and the regulation of a crossing of a steam railroad by a street railway is within the jurisdiction of a Court of Equity under the Act.¹⁶⁵

¹⁶² *Pennsylvania R. R. v. Greensburg, Jeannette & Pittsburg St. Ry.*, 176 Pa. 559 (1896); *Keogh v. Pittston & Scranton St. Ry. Co.*, 5 Lacka. 242 (1899); *Pennsylvania R. R. & Pittsburgh, Virginia & Charleston Ry. Co. v. Glenwood & Dravosburg Elec. Str. Ry. & Second Avenue Trac. Co.*, 184 Pa. 227 (1898); *Delaware & Hudson Canal Co. v. Lackawanna Valley Trac. Co.*, 2 Lacka. 295 (1896); *Pittsburg Junction R. R. v. Fort Pitt Str. Pass. Ry.*, 192 Pa. 44 (1899.)

¹⁶³ *Cumberland Valley, etc. R. R. Co. v. Chambersburg & Gettysburg Elec. Ry.*, 6 Dauph. 196 (1903.)

¹⁶⁴ *Canton Township v. Washington & Canonsburg Ry. Co.*, 34 Pitts. 142 (1903.)

¹⁶⁵ *Pennsylvania R. R. v. Braddock Electric Ry.*, 152 Pa. 116 (1893); see Chapter xv., Taking of Property Devoted to Public Use; Crossing of Street Railways.

Where a railroad company has located a branch line, but has not immediately proceeded to construct it, the company may maintain a bill in equity against a street railway company to restrain the construction of the latter company's line over the branch until the rights of the parties are ascertained.¹⁶⁶

Where a railroad company and a street railway company have used a grade crossing for years, the former company has no standing to restrain the latter company from using the crossing after the street railway company had changed its motive power from horses to electricity. The Act of 1871 does not apply to such a case.¹⁶⁷

A railroad company has a standing in a court of equity to restrain a street railway company from constructing its road across a railroad at a point other than at the crossing of a highway. Thus a railroad company may prevent a street railway company from constructing an overhead bridge one hundred feet in length, for the operation of electric cars, at a point where there has never been an overhead or grade-crossing before.¹⁶⁸

Where a passenger railway is located on a public road, it may occupy the same as a crossing for its tracks at the point of crossing a steam railroad, but it cannot go beyond the mere crossing to take land of the railroad company for its own use, without the consent of the railroad company, the owner in fee of the land.¹⁶⁹

A passenger railway company, which had the right to cross the track of another company by using a steam dummy engine, afterwards substituted electricity for steam as a means of propulsion, and sought to cross the tracks of defendant company by using an electric trolley wire strung above the track. The evidence showed that the use of the trolley would cause no additional annoyance or be more dangerous than the former

166 *Ohio River Junction R. Co. v. Freedom & C. Electric Ry. Co.*, 204 Pa. 127 (1902.)

167 *Norristown Junction R. v. Citizen's Pass. Ry.*, 9 Montg. 103 (1903.)

168 *Northern Central Ry. v. Harrisburg & Mechanicsburg Electric Ry.*, 177 Pa. 142 (1896); *Cumberland Val. R. R. v. Harrisburg & Mechanicsburg Electric Ry.*, 177 Pa. 155 (1896.)

169 *Trenton Cut-Off R. R. & Pennsylvania R. R. v. Newtown Electric Str. Ry.*, 8 Dist. 549 (1899.)

method of crossing by steam. It was held that the crossing would be allowed and permission given for placing the trolley wires in such a way as not to interfere with the operation of defendant's road.¹⁷⁰

Paving and Repairing Streets—General Liability.

332. A street railway company is bound to keep the portions of the streets occupied by its right of way in good condition, even in the absence of any contract or statutory obligations.¹⁷¹

Where a street railway company is obliged, under its charter, to pay for the original paving of a street, an abutting land owner who is sued for such paving by a contractor, may set up as a defence the obligation of the street railway company to pay for the paving.¹⁷²

The municipality may relieve a street railway company of the duty of paving a street imposed as a condition of municipal consent. If this is done, the abutting property owners will thereafter be liable for the original costs of paving. "As councils could have consented in the first instance without requiring the railway to do original paving, so they could equally well recall that requirement at any later time."¹⁷³

Paving and Repairing Streets—Kind of Material.

333. A company incorporated under a special charter (Act of April 15, 1863), which provided that it should keep the portion of the streets occupied by its railway in good repair, cannot be required to repave the streets with a new and different kind of pavement adopted by the city.¹⁷⁴

After a street in a borough has been macadamized, a street railway company was authorized to lay its tracks thereon. The railway company was to keep in repair the portion of the street between the tracks and a space of one foot on each side thereof.

170 *Philadelphia & West Chester Turnpike Co. v. Philadelphia & Delaware Co. R. R.*, 5 Dist. 305 (1896); 6 Del. 357 (1896.)

171 *Reading v. United Traction Co.*, 202 Pa. 571 (1902.)

172 *Philadelphia to use v. Bowman*, 166 Pa. 393 (1895.) See *Erie v. Piece of Land*, 171 Pa. 610 (1895.)

173 *Philadelphia v. Bowman*, 175 Pa. 91 (1896.)

174 *Williamsport v. Williamsport Pass. Ry.*, 206 Pa. 65 (1903); see *Williamsport v. Williamsport Pass. Ry.*, 203 Pa. 1 (1902.)

If the grade of the street should be changed, the street railway company was to make its tracks conform to the new grade at its own expense. Subsequently the borough resolved to pave the streets with Belgian blocks, and notified the railway company to pave with blocks the street between the tracks, and for one foot outside of the tracks. The company sank its tracks to the new grade, but refused to pave with blocks. There was evidence that the portion of the street which the company was to keep in repair was in bad condition. The borough made the improvement and sued the railway company. It was held that the case was for the jury.¹⁷⁵

Where a company contracts with a borough to pave a certain portion of the street with mountain stone or other suitable material, subject to the approval of the town council, and also upon five days' notice from the borough to repair and repave the street, and further to save the borough harmless from loss arising in consequence of the construction or operation of the railway, the borough in an action against the railway company to recover the amount of a judgment which it had been compelled to pay for personal injuries, cannot after having averred in its statement that the injuries were caused by the failure of the company to keep the street in repair, offer proof that the injury was caused by a defect in the original construction five years before; nor can it recover unless it shows that it gave five days' notice to the railroad company to repair the defect which caused the accident.¹⁷⁶

A street railway which is required by its charter or a municipal ordinance to keep in repair the streets which it occupies, may be compelled to replace an old pavement by a new one of a different and improved kind. Thus a street railway company whose duty it was to repair and repave a street, but refused to do so, may be compelled to pay the cost of repaving the street with asphalt where the re-paving has been done by the city.¹⁷⁷

A provision in the charter of a street railway company that

175 *McKeesport Borough v. McKeesport Pass. Ry.*, 158 Pa. 447 (1893.)

176 *Gilberton Borough v. Schuylkill Trac. Co.*, 22 Super. Ct. 279 (1903.)

177 *Philadelphia v. 13th & 15th Sts. Pass. Ry. Co.*, 169 Pa. 269 (1895); affirming s. c., 15 Pa. C. C. R. 29 (1894); 3 Dist. 468 (1894.)

it shall keep the street in "perpetual good repair" at its own expense, does not mean that the company shall replace a pavement with a new and improved and more expensive style of pavement whenever the city shall so direct, but it means that when the city has determined what pavement shall be used, and when it shall go down upon a given street, the duty to repair is upon the railway company.¹⁷⁸

Where a street railway has occupied streets of a city with its consent and on condition that it pave its right of way and keep the same in good repair, or that it pave its right of way in a specified manner, superior to the construction of the streets at that time and keep the same in repair, the city may upon adoption and upon notice to the company of the adoption of an improved pavement for the rest of the street with which the original pavement of the right of way is incongruous and incompatible, require the company, the pavement upon its right of way being out of repair, to replace the same with a pavement reasonably corresponding with the street pavement adopted.¹⁷⁹

A borough ordinance granting to a street railway company the use of streets, provided that the tracks should be laid upon the grade of the street; that the company should "maintain and keep in repair a roadbed four and a half feet in width from the centre of their track, on either side of said centre," that the company should use the same material in making such repairs that the borough might use for the same purpose or such other material as the borough should approve; and that the company should on being notified so to do for fifteen days before the work was to begin, join with the borough in the improvement of any street by repairing or macadamizing as the borough might elect, and repair and macadamize the nine feet of road provided for by the ordinance, at its own cost. It was held that while the borough could not demand that the railway company should pay the cost of a pavement different in kind from what the borough used, it could demand that the company should pay the cost of putting its tracks on the legal grade, and

¹⁷⁸ *Philadelphia v. Hestonville, Mantua & Fairmount Pass. R. R.*, 177 Pa. 371 (1896.)

¹⁷⁹ *Reading v. United Trac. Co.*, 202 Pa. 571 (1902); affirming 24 Pa. C. C. R. 629 (1901.)

also its share of the cost of repairs as provided by the contract.¹⁸⁰

Where a borough ordinance granted to a street railway company the right to use streets, provided that the company should keep the space between their tracks and eighteen inches outside in good repair, and to conform to the macadamizing or paving in the borough, and that whenever the borough should pave with asphalt, the company should do so between the tracks and eighteen inches outside, a later ordinance relieving the company from making ordinary repairs, will not relieve the company from paving with asphalt between its rails and eighteen inches outside, portions of the older streets of the borough, from which the old macadamized pavement had been removed and on which the borough had laid asphalt.¹⁸¹

Paving and Repairing Streets—When Company is not Liable.

334. A street railway company's charter provided as follows: "The said company is hereby authorized and empowered to construct and lay the said railway without obtaining the consent of the city councils of the city of Philadelphia; but whenever the said railway shall be laid and used by running passenger cars thereon, the said company shall be subject to the ordinances of the city of Philadelphia regulating the running of passenger railway cars." It was held that the company could not be required by ordinance to repair the streets of the city. The ordinances referred to in the Act were merely such as regulated the running of cars by prescribing the frequency with which cars should be run, the rate of speed, the protection of the public at crossings, and similar subjects.¹⁸²

An Act of Assembly incorporating a street railway company provided as follows: "The city councils may from time to time by ordinance, establish such regulations in regard to said railway as may be required, for paving, repaving, grading, culverting of, and laying gas and water pipes in and along said

180 *Shamokin Borough v. Shamokin Street Ry. Co.*, 178 Pa. 128 (1896.)

181 *West Chester Borough v. West Chester Str. Ry.*, 203 Pa. 201 (1902.)

182 *Philadelphia v. Empire Pass. Ry.*, 177 Pa. 382 (1896); affirming 5 Dist. 53 (1896); 18 Pa. C. C. R. 81 (1896); *Philadelphia v. Continental Pass. Ry.*, 177 Pa. 386 (1896.)

streets, and to prevent obstruction thereon." It was held that this provision of the act did not mean that the railroad company may be required to pave, to repave, to repair or grade, or lay water or gas pipes along all the streets it traverses with its railway, but that it shall not obstruct the city in the prosecution of municipal improvements upon the city streets."¹⁸³

A street railway company which is required by its contract with a borough to pave the full width of a street where sidings are maintained, whenever the borough paves the rest of the street, may remove the siding before such paving is begun; and if it gives notice to the borough prior to the ordinance authorizing the paving, of its intention to remove the siding and likewise notifies the borough three months before the latter incurs any liability, that the siding will be removed as soon as the frost is out of the ground, and the siding is removed, the company cannot be held liable for paving the full width of the street at the point where the siding was located.¹⁸⁴

If the city contracts for the repaving of a street as a whole, it cannot compel a railway company occupying with its tracks an intersecting street to pay for the paving of the intersection of the two streets.¹⁸⁵

Where the charter of a street railway company provided that a municipality should have the power to establish such regulations in regard to the railway as may be required for the purpose of paving, repaving, grading in and along the streets in the city used by the company, the municipality may require that all necessary changes, such as depression of tracks, etc., be made at the expense of the railway company.¹⁸⁶

If the charter of a passenger railway company provides that it is not liable for paving or repaving streets occupied by its tracks, the railway company is under no liability to pave the streets traversed by its line of road, and it cannot be held liable for the cost of paving a street because it had knowledge of a

¹⁸³ *Philadelphia v. Hestonville, Mantua & Fairmount Pass. Ry.*, 177 Pa. 371 (1896.)

¹⁸⁴ *Shamokin Borough v. Shamokin & Mt. Carmel Elec. Ry.*, 206 Pa. 625 (1903.)

¹⁸⁵ *Philadelphia v. Philadelphia City Pass. Ry.*, 177 Pa. 379 (1896.)

¹⁸⁶ *Reading v. United Trac. Co.*, 202 Pa. 571 (1902); affirming 24 Pa. C. C. R. 629 (1901.)

contract between the city and a paving company which did the paving, or because its officers conferred with the highway committee as to the grade of the street, or because it paid, under protest, the cost of a portion of the paving of the street.¹⁸⁷

Where the ordinances of a city provide that street railway companies shall pave or repave the highways "when requested to do so by the chief commissioner of highways," or "after notice has been given to the company by the chief commissioner of highways," and that if the companies refuse or neglect to do the work, the city may do it at the expense of the company, the city cannot recover the cost of paving or repaving, unless it can show that the proper notice and request had been given to the company, demanding that it should itself do the work of paving.¹⁸⁸

Where a city brings suit against a street railway company to recover the cost of paving streets occupied by the tracks of the company, and it appears that the company sued was under no charter, contractual or statutory obligation to pay the cost of paving the streets, the city cannot, after the statute of limitations has run against its claim, be permitted to amend its statement so as to aver that the company had by lease or merger acquired the franchises and assumed the burden of another railway company, and that by reason of such assumption of obligation it was liable for the paving. Such an averment introduces an entirely new cause of action.¹⁸⁹

Where a municipal ordinance provided that a railway company in return for the privilege of using certain streets should pave the same and "keep said paving in good repair," and also provided that the company should make no obstructions while street improvements are in progress, and that "if tracks are to be removed or raised during such improvement the expense thereof, as well as any damage to the tracks shall be borne by the company," such an ordinance does not impose

187 *Williamsport v. Williamsport Pass. Ry.*, 203 Pa. 1 (1902.)

188 *Philadelphia v. Hestonville, Mantua & Fairmount R. R. Co.*, 203 Pa. 38 (1902); affirming 11 Dist. 33 (1901); 27 Pa. C. C. R. 129 (1901.)

189 *Philadelphia v. Hestonville, Mantua & Fairmount R. R.*, 203 Pa. 38 (1902); affirming 11 Dist. 33 (1901); 27 Pa. C. C. R. 129 (1901.)

upon the company the expense of repaving streets where the paving has been torn up for a municipal improvement.¹⁹⁰

Paving and Repairing Streets—Consolidated Company.

335. Where the charters of two street railway companies each provide that the companies shall respectively pave the streets occupied by them, and the two companies are merged and the merger is ratified by an act of the legislature wherein certain rights existing in the old companies are surrendered, and the old franchises confirmed, and new ones granted, the new consolidated company accepts the provisions of the act subject to all the incidents, duties and obligations which attached to the old companies under their charters, including the duty of keeping the streets in repair.¹⁹¹

Paving and Repairing Streets—Sprinkling Streets.

336. A city may require, by ordinance, a street railway company to sprinkle a street occupied by it.¹⁹²

Paving and Repairing Streets—Liability for Accidents.

337. Where a street railway company is bound to keep a street in repair, and permits a deep rut to continue close to the outer side of a rail, and the wheels of a wagon fall into the rut, and the driver is thrown and injured, the railway company is liable for the injuries, if the driver himself was not guilty of contributory negligence.¹⁹³

A street railway company in Philadelphia operated two tracks on Berks street which curved northward into Front street. Plaintiff was walking in the night time south on the west side of Front street with the intention of crossing Berks. The substance of his testimony was that when he reached the corner of these streets, and before he left the pavement, he saw a car coming east on Berks street, on the track furthest

¹⁹⁰ *Reading v. Reading & Southwestern Str. Ry.*, 19 Super. Ct. 202 (1902.)

¹⁹¹ *Philadelphia v. 13th & 15th Sts. Pass. Ry. Co.*, 169 Pa. 269 (1895); affirming 15 Pa. C. C. R. 29 (1894); 3 Dist. 468 (1894.)

¹⁹² *Chester v. Chester Traction Co.*, 4 Super. Ct. 575 (1897.)

¹⁹³ *McLaughlin v. Phila. Traction Co.*, 175 Pa. 565 (1896.)

from him, and twenty or thirty yards from the crossing. Supposing that he would have time before the car reached him, he started to cross Berks street on the flag or stepping stones. After crossing the tracks nearer to him, he observed for the first time that the car was approaching rapidly, and had almost reached the crossing. He stopped in the space between the tracks to allow it to pass, and then, thinking that in turning the curve the horses would be out of the tracks, he stepped backward a step or two to avoid them. As he did so his foot went into a hole, or among loose cobble stones, and sank down, and he was thrown forward. He fell with both arms across the track and in front of the hind wheel of the car, which passed over them, causing such injuries as to require amputation. The duty of repairing the street was on the railroad company. It appeared that the street at the place of the accident had been out of repair for several months. It was held that a verdict and judgment for plaintiff should be sustained.¹⁹⁴

In an action against a street railway company to recover damages for the death of a horse, it appeared that the contract of the street railway company with the city was "that the railway company shall keep and maintain the streets in good order at all times," after notice of defects from the city. Plaintiff's horse while being driven along between the tracks of the defendant company suddenly walked into a hole about one square foot in surface measurement and four feet in depth, and sank to the belly, sustaining injuries which caused its death. It did not appear what was the cause of the condition of the street, nor was it clearly shown that there was a hole there previous to the accident or that the horse was not precipitated into the ground by the unexpected cave-in of the street at that point, nor whether it was the result of an inevitable accident or caused by some default of the city or railway company. It, however, did appear that the defect was first noticed at the time the accident happened to the plaintiff, and that its existence was not known the previous evening when plaintiff used the street.

It was held that a non-suit was properly entered.

¹⁹⁴ *Kraut v. Frankford & Southwark Phila. City Pass. Ry.*, 160 Pa. 327 (1894.)

Orlady, J., said: "The duty of the municipality is to keep its streets in safe condition at all times, but its liability to persons injured on account of the neglect or omission of this duty is always conditional upon first, a positive misfeasance in doing acts which cause the street to be out of repair, in which case no other notice to the corporation of the street is essential to its liability, or second, the neglect of the corporation to put the streets in repair, or remove obstructions therefrom, or remedy causes of danger, occasioned by wrongful acts of third parties, in which cases notice of the condition of the streets, or what is equivalent to notice is necessary. The municipality cannot by a contract impose any higher or greater liability on its licensee than the law imposes upon the municipality; and the clause in the contract providing 'that the railway company shall keep and maintain the streets in good order at all times,' would not make the defendant liable in a case where the city would not be liable, provided the duty created by law had been performed by the city in accordance with the requirements of the law. To hold the defendant liable would be to make it an insurer of the safe condition of the streets at all times, which the city is not. To entitle the plaintiff to recover against either he must show actual or constructive notice of the defect and a failure to exercise reasonable care and diligence to remedy it."¹⁹⁵

Change of Grade by City.

338. A bill in equity against a street railway and a city to compel the restoration of a grade cannot be maintained against the street railway company, where there is no allegation in the bill that the change of grade was made by the company without the consent of the city. The city alone has the exclusive right to establish the grades of streets.¹⁹⁶

Where an ordinance of a city authorized the grading of a street, a passenger railway company located thereon, which occupies the street subject to the right of the city to change the grade, cannot recover from the city any loss resulting to it by reason of the necessary interruption of travel upon it while the

¹⁹⁵ *Sanford v. Union Passenger Railway Co.*, 16 Super. Ct. 393 (1901.)

¹⁹⁶ *MacHale v. Easton & Bethlehem Transit Co.*, 169 Pa. 416 (1895.)

work was in progress. Dean, J., said: "It is indisputable that the grade adopted by the city could not from its very nature have been constructed on the ground without more or less interruption of travel on the street, both by vehicles and railway. The length of street affected by the change was four miles; to have put at work a sufficient force of men, animals and machinery to accomplish the change in the shortest possible time would for that time have stopped all travel for the whole length of the avenue. . . . When the improvement was determined on the problem presented was, is it better to absolutely exclude the public from the avenue, including the passenger railway, for one year and put sufficient force on to complete the work in that time? Or should it be done in sections, leaving the avenue open its whole length, but the public more or less inconvenienced at some point, for four years? The city adopted the second method; that may have been a mistake of judgment, but the city is not liable for a mere mistake in judgment. The railway company was only an artificial person using the street in common with natural persons. Whatever rights it may possess in the use of the street by reason of its construction and purpose distinct from those of the general public, it has no peculiar or special exemption from the interruption and damage necessarily resulting from municipal improvements. . . . The city had authority to grade and improve the street. In doing this it had the right to adopt such method of allotting and carrying on the work as to it seemed best. For the damage resulting to the public because of the necessary interruption to travel during the progress of the work under the plans adopted it is not answerable to one of the public unless the complainant shows a damage different in kind and peculiar to himself. The damage here shown, viz., that the company's cars were detained; that they were obliged to run fewer cars; that their rolling stock and horses were injured and that their passenger traffic and receipts fell off, though probably greater in amount than that sustained by any other person, is of the same kind as suffered by the general public using the street."¹⁹⁷

¹⁹⁷ Ridge Avenue Pass. Ry. v. Philadelphia, 181 Pa. 592 (1897); 28 Pitts. 55 (1897.)

A city has the right to change the grade of a street, which was formerly the bed of a turnpike, without regard to the contracts of the turnpike company with a street railway company antedating the acquisition of the street by the city.¹⁹⁸

Rails.

339. A street railway company may only make such changes in the grade of a turnpike as are reasonably necessary, and its rails must conform to the grade of the turnpike as closely as possible. It must lay its rails in such a manner as to do as little injury to the turnpike, and as little inconvenience to the public travel as is reasonably possible. It is not bound to lay down a flat rail upon so much of the turnpike as may be properly called a country road in distinction from a street.¹⁹⁹

Elevated Passenger Railroads.

340. There is no statute in Pennsylvania authorizing the construction of an elevated passenger railroad. A company organized under the Act of April 4, 1868, although entitled an elevated railroad company, is not a street passenger railroad, and cannot construct an elevated street passenger railroad in the streets of a city, even though the municipal authorities may have given their consent.²⁰⁰

The Act of June 7, 1901, relating to elevated railroads, is constitutional. It is not special legislation nor is the provision as to compensation of land owners and the filing of bonds inadequate. A common bond filed by a railroad company to secure land owners where land is condemned is sufficient to protect each land owner. An elevated railway company incorporated under the Act of June 7, 1901, but prior to the passage of the Act of June 20, 1901, is not within the restrictions of the latter Act, although the company is the only one which was chartered between the dates of the two Acts.²⁰¹

198 Ridge Avenue Pass. Ry. v. Philadelphia, 181 Pa. 592 (1897.)

199 Berks & Dauphin Turnpike Road Co. v. Lebanon & Myerstown Str. Ry. Co., 3 Dist. 55 (1893.)

200 Potts v. Quaker City Elevated R. R. Co., 161 Pa. 396 (1894); Com. ex. rel. v. Northeastern Elevated Ry. Co., 161 Pa. 409 (1894.)

201 Philadelphia & Trenton R. R. and Pennsylvania R. R. v. Neshaminy Elevated R. R., 26 Pa. C. C. R. 504 (1902); 11 Dist. 461 (1902.)

A passenger railway company incorporated under the Act of June 7, 1901, for the purpose of constructing an elevated passenger railway on a public highway for a distance of one mile, may after it has received the consent of the local authorities and has filed a bond to secure a non-consenting land owner, build such a road, notwithstanding the existence of injunctions secured at the instance of the land owner and restraining other street railway companies from building a surface street railway in the mile designated so as to complete a continuous line of long distance electric railway.²⁰²

202 Philadelphia & Trenton R. R. v. Neshaminy El. Ry. Co., 206 Pa. 343 (1903.)

APPENDIX.

STATUTES.

I.

ORGANIZATION AND CONSTRUCTION.

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AN ACT to amend and extend an act, entitled "An act further to regulate proceedings in courts of justice, and for other purposes," approved the sixth day of May, one thousand eight hundred and forty-four, authorizing the judges in vacation, or when court is not in session, to approve bonds of railroads and canal companies for land damages.

Section 5. That in all cases in which any railroad or canal company is or shall be required to give security to the owners of lands through which any railroad or canal may pass or be located, any one of the judges of the Court of Common Pleas having jurisdiction in respect to the approval of such security, shall have the power at any time during vacation, or when such court shall not be in session, to receive the application and approve the bond and the security offered, and direct such bond to be filed in the said court for the benefit of the parties entitled to receive the damages: Provided, That not less than ten days' notice shall first be given to the owners of such land, or to their known agent or attorney, of the time and place when

and where such bond and security will be offered to the judge, and the names of the sureties to be offered.

Approved May 22, 1895. P. L. 110.

AN ACT to provide for increasing the capital stock and indebtedness of corporations.

Section 1. That the capital stock or indebtedness, or both of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation. Such increase of either may be made at once, or from time to time, as the stockholders aforesaid shall determine.

Section 2. That any corporation desirous of increasing its capital stock or indebtedness, or both, as authorized by this act, shall by resolution of its board of directors, adopted by a majority of the entire number thereof, declare such purpose, and thereupon by resolution, similarly adopted, direct that the question of such proposed increase shall be submitted to the stockholders of such corporation for their consent; either,

(A). At any prescribed regular annual meeting or adjournment thereof, the notice whereof, stating *inter alia* that such subject would be considered thereat, shall have been published once a week for sixty days prior to such meeting in at least one newspaper published in the county, city or borough wherein the chief office or place of business of the corporation is situate. At said meeting the question shall be submitted to the stockholders, and it shall be the duty of the president and secretary of said meeting, by such agencies or methods as to them may seem meet, to ascertain whether the persons and bodies corporate holding the larger amount in value of the stock of said corporation shall have consented to such increase, and upon being so satisfied to certify in duplicate the fact, under oath duly administered: Provided, That should a stock vote be duly demanded at said meeting, it shall be the duty of the president and secretary, in ascertainment of the fact of the consent, to cause such vote to be taken at the same time and

place, by the same persons and in the same manner, as the vote for directors or managers of such corporation shall be taken; or,

(B). At a special meeting of the stockholders, notice of the time, place and object of which shall have been published once a week for sixty days prior to said meeting in at least one newspaper published in the county, city or borough wherein such office or place of business is situated. At such meeting thus called, or any adjournment thereof, an election of the stockholders shall be taken for or against such increase, which shall be conducted by three judges, stockholders of such corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent the judge or judges present shall appoint a judge or judges who shall act in the place of the judge or judges absent; and said judges shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same, well and truly and according to law to conduct such election to the best of their ability; and the said judges shall decide upon the qualifications of voters, and when the election is closed count the number of shares voted for and against such increase, and declare whether the persons and bodies corporate holding the larger amount of the stock of such corporation have consented to such an increase or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such increase and the number that voted against such increase, and subscribe and deliver the same to one of the chief officers of said company. Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting; nor shall any proxy be received, or entitle the holder to vote, unless the same shall bear date and have been executed within four months next preceding such election or meeting; and it shall be the duty of such corporation to furnish the judges, at said meeting, with a statement of the amount of its capital stock, with the names of the persons or bodies corporate holding the same, and the number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation, with an affidavit

thereto annexed that the same is true and correct to the best of his knowledge and belief.

Section 3. That it shall be the duty of such corporation, if consent is given to such increase, to file in the Office of the Secretary of the Commonwealth, within thirty days after such election, one of the copies of the certificates of the president and secretary of the annual meeting, or one of the copies of the return of such election at the special meeting hereinbefore provided for, with a copy of the resolution and notice calling the same thereto annexed; and thereafter the increase may be made at such time or times as shall be determined by the directors. Upon the actual increase of the capital stock or indebtedness of such corporation, made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase actually made, and concurrently therewith such corporation shall pay to the State Treasurer, for the use of the Commonwealth, such bonus on the actual increase shown by said return as shall then be prescribed by law. In case of neglect or omission to make said return, such corporation shall be subject to a penalty of five thousand dollars, in addition to the bonus, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as accounts for taxes due the Commonwealth are settled and collected; and the Secretary of the Commonwealth shall cause said return to be recorded in a book for that purpose and furnish a copy of the same to the Auditor General.

Section 4. Nothing in this act contained shall be construed as compelling resort to the process herein provided in the case of indebtedness contracted in the usual course of corporation business. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed: Provided, however, That any proceeding for increase of capital stock or indebtedness, begun under existing law prior to and not completed at the date this act becomes effective, shall be consummated under the authority of this act if the antecedent proceedings shall have conformed to its requirements; but if such antecedent proceeding shall not have so conformed, then the proceeding shall be consummated under the provisions of the law existing

prior to the passage of this act: Provided, however, That the provisions of this act shall not inure to the benefit of any railroad, canal or other transportation corporation, unless such railroad, canal or other transportation corporation shall, before claiming or using the benefits of this act, file in the office of the Secretary of the Commonwealth an acceptance of all the provisions of article seventeen of the Constitution of this Commonwealth, which acceptance shall be made by resolution adopted at a regular or called meeting of the directors, trustees or other proper officers of such railroad, canal, or other transportation corporation, certified under the seal of the corporation, and a copy of which resolution, certified under the seal of the Office of the Secretary of the Commonwealth, shall be evidence for all purposes.

Approved—February 9, 1901. P. L. 3.

AN ACT to permit the classification by railroad, railway and transportation corporations of their boards of directors or managers.

Section 1. That it shall be lawful for the stockholders of any railroad, railway or other transportation company at any meeting, annual or otherwise, held after notice of intention to present thereto the subject of such classification, by a vote of a majority of the shares there represented, either in person or by proxy, to classify its directors or managers thereafter to be chosen into two, three or four classes, each to contain an equal number unless the board shall consist of a number which shall not be divisible into equal parts, in which case the excess which cannot thus be divided shall be added to the first class. At the next annual election of said corporation, held after such classification shall have been determined upon, directors or managers of the first class shall be elected to serve for the term of one year, and directors or managers of the second, third, or fourth classes shall be elected to serve for two, three or four years, respectively. At all ensuing elections of said corporation the stockholders shall only elect the number of directors or managers necessary to take the place of those whose term of office shall have then expired or be about to expire, and such directors or managers shall be elected for the longest term for which any class may be elected.

Every vacancy which shall occur in any class of the members of the board shall be filled by the board until the next annual election for members of the class in which such vacancy shall occur. After any corporation shall have determined upon any such classification as that herein permitted, it shall not thereafter change the same, unless with the assent of the stockholders duly expressed at a meeting properly called. All laws or parts of laws inconsistent herewith are hereby repealed.

Approved—February 9, 1901. P. L. 6.

AN ACT to authorize railroads, heretofore or hereafter constructed to any river forming the boundary between this and any adjoining State, to be built by means of a bridge and its approaches to the middle of such river, and there connect with any railroad of such adjoining State, heretofore or hereafter constructed.

Section 1. That it shall be lawful for any railroad company of this State, which shall have heretofore constructed or shall hereafter construct its railroad to any river forming the boundary between this and any adjoining State, to build such railroad, with so many tracks as it shall deem necessary, by means of a bridge and its approaches, to the middle of such river, and there connect the same with any railroad of such adjoining State, heretofore or hereafter constructed, and for that purpose such company shall have all the powers conferred upon it with respect to other portions of its railroad.

Approved—April 4, 1901. P. L. 63.

AN ACT relating to railroad crossings of highways, and for the regulation, alteration and abolition of grade crossings, except in cities of the first and second classes.

Section 1. That, except as in this act, elsewhere provided, all crossings, hereafter established, whether of highways by railroads or of railroads by highways, shall, except in cities of the first and second classes, be above or below the grade thereof.

Section 2. Every railroad company constructing a new line of railroad, under its chartered powers, across a highway, except in cities of the first and second classes, shall construct the same above or below the grade of the highway, unless permit-

ted, in the manner hereinafter provided, to construct the same at grade; and such railroad company may exercise the powers, contained in its charter and the general laws, for altering the grade and location of highways in order to avoid grade crossings.

Section 3. Every municipality or other authority, hereafter constructing a highway, except in cities of the first and second classes, across an existing railroad, shall construct the same above or below the grade thereof, unless permitted, in the manner hereinafter provided, to construct the same at grade, and the cost of said work shall be paid one-half by said municipality and one-half by the railroad company owning said railroad.

Section 4. Whenever it shall be desired by any railroad company, constructing a new railroad, or by any municipality or authority, constructing a new highway, except in cities of the first and second classes, that the railroad or highway should be so constructed that the railroad and highway shall cross each other at the same grade, a petition shall be presented by the party desiring such construction to the Court of Common Pleas of the district within which said crossing is situated, upon ten days' notice to the corporation owning said railroad or to such municipality or authority, describing the proposed construction, and setting forth the reasons that are supposed to make the same necessary or desirable; and the Court of Common Pleas shall thereupon have jurisdiction of the parties and the subject matter of such petition, and may proceed summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master or to commissioners, or otherwise, and if satisfied that such construction is reasonably required to accommodate the public or to avoid excessive expense in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such orders, in its discretion, prescribe what gates, signals, or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by statute; and all such orders shall be bind-

ing upon the parties, and shall be observed by them; all costs and expenses of the proceedings shall be ascertained and allowed by the Court of Common Pleas, and shall be paid by such party as it shall decide, or be by it apportioned between the parties, and may be collected by execution out of said court.

Section 5. Any railroad company may, at any time, at its own cost and of its own motion, vacate and alter any crossing of its tracks at grade by a highway, except in cities of the first and second classes, by passing the highway over or under its railroad, and for this purpose may use the powers contained in its charter and the general laws for altering the location and grade of the highway: Provided, That no highway which has been constructed at grade, by permission of the Court of Common Pleas, shall be so altered without like permission, unless by agreement with the municipality wherein the crossing is situated.

Section 6. Any municipality, except cities of the first and second classes, may of its own motion, at any time, at its own cost, vacate and alter any railroad grade crossing of a highway, within its limits, by passing the highway over or under the grade of the railroad: Provided, That no highway which has been constructed at grade, by permission of the Court of Common Pleas, shall be so altered without like permission, unless by agreement with the railroad company: And Provided, further, That such alteration shall not, without the consent of the railroad company, create a steeper gradient than the established gradient, in the same direction, upon the division of said railroad upon which the crossing is located. The said municipality shall, before proceeding with the work, give thirty days' notice to the railroad company of the proposed vacation, alteration and change, with plans and details thereof; and it shall be the duty of the railroad company, in case the highway is to be carried under the railroad to protect and support the railroad tracks during the progress of the work, and in case of the failure of the railroad company so to do, the municipality may proceed to enter upon the railroad and provide for such protection and support.

Section 7. If any additional lands or rights or easements therein are necessary or required for the use of the railroad company, in making the changes hereinbefore authorized, the

same may be purchased or condemned by the company owning or operating said railroad, and for that purpose the company owning or operating the railroad is hereby invested with all the powers of condemnation contained in the charters of said companies or either of them, or in the laws under which said companies or either of them is organized; such lands taken by the railroad company shall be paid for by the company acquiring them. If any additional lands or rights or easements therein are necessary or required for the changes of highways, or the locations of new highways or passageways, such lands may be taken by the municipality by purchase or condemnation, and the cost of the same shall be deemed a part of the cost of the changes and alterations, and paid for in like manner as the other expenses thereof. The railroad companies interested in the proposed improvement shall have notice of any such condemnation proceedings, and the right to be heard therein, and no such purchase shall be made without the approval of the railroad company.

Section 8. In case the parties interested cannot agree upon the damages sustained by any person, through the alteration of the grade of any public highway, as aforesaid, the same shall be determined by a jury, in the Court of Common Pleas for the district where the crossing and property are situated, upon petition brought by any party so claiming to be damaged, as aforesaid, within one year after the decree of the court shall have been rendered in the proceedings aforesaid.

Section 9. Whenever it is necessary for the safety of any railroad, operated by steam, or for the convenience or safety of the public, except in cities of the first and second classes, that a private way crossing a railroad operated by steam, shall be changed or abolished, the said railroad company shall have a right, upon petition to the Court of Common Pleas of the district in which the same may be situated, to apply for a removal and discontinuance of the same, and the said court shall determine such question, upon the proper notice and hearing; and any party claiming damage by reason of said removal or discontinuance, shall have the right to have the same determined by a jury and proper proceedings in said Court of Common Pleas, within one year from the date of the decree of said court

ordering said removal or discontinuance, and the decree of the court in such matter shall be final and conclusive.

Section 10. Nothing in this act shall prevent any railroad company from laying additional tracks at crossings previously existing, or from constructing switches and sidings and branch lines from their lines of railroad, now or hereafter constructed, to any mill, factory or other manufacturing establishment, or other industrial plant, or any elevator, wharf or pier, or gravel, marl or clay bed, or any mine, or from laying additional tracks to increase their yard facilities at terminal or other points, across public highways at the grade thereof, outside of the corporate limits of cities of the first and second classes; but such signposts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways.

Section 11. This act shall take effect on and after June first, one thousand nine hundred and two.

Approved June 7, 1901. P. L. 531.

AN ACT authorizing municipalities to define and fix the terms for the use of public parks, or grounds of any kind, for railroad purposes.

Section 1. That the municipal and other corporation or public officers, or authorities owning or having charge of any park or public grounds in cities of the first and second class, may enter into an agreement with any railroad company, maintaining and operating a railroad within this State, defining and fixing the manner, terms and conditions upon which such park or public grounds, or any portion thereof, may be used and occupied by said railroad company with its tracks and passenger station buildings.

Approved—June 7, 1901. P. L. 491.

AN ACT authorizing corporations organized under the laws of Pennsylvania to increase or diminish the par value of the shares of their capital stock.

Section 1. That it shall be lawful for any corporation, organized under the laws of this State, to change the par value or face value of the shares into which its capital stock is divided. Such change shall be authorized by a vote

of a majority of the stockholders of any such company, present in person or by proxy at any annual meeting, or any special meeting duly called for that purpose. Such change of the par value of the capital stock shall not be taken to increase or diminish, or change in any way, the total aggregate par value of the capital stock which said company may be authorized to issue or may have issued, but only to change the number of shares into which the same may be divided.

Section 2. In case the stockholders, so present at such meeting, shall vote to increase or diminish the par value of the shares of the capital stock of the company, as above provided, it shall be the duty of the proper officers of the company to file a certificate of the fact in the office of the Secretary of the Commonwealth, under the seal of the corporation; and thereupon the proper officers of such corporation shall issue to the stockholders the proper number of shares of the capital stock of the new par value, in exchange for outstanding shares of the former par value, upon the surrender of such outstanding shares by the respective holders and the cancellation thereof.

Approved—July 2, 1901. P. L. 606.

AN ACT to provide for the construction of bridges over or under existing railroads, at the expense of the county, where a public highway or a road, about to be opened, intersects or will intersect an existing railroad or railroads, and the township within which the bridges may be necessary is reasonably unable to bear the expense of the same.

Section 1. That when one or more existing railroads, over or under which it may be advisable, for the protection of travelers, to erect a bridge, crosses a public road or highway which may hereafter be opened, and the erection of such bridge requires more expense than is reasonable that one or two adjoining townships should bear, or more than is reasonable that the township wherein the bridge is to be located should bear, the Court of Quarter Sessions of the county wherein such bridge is to be erected shall, on the representations of the supervisors or on the petition of any of the inhabitants of the township, order a view, in the manner provided for in the case of roads; and if, on the report of the viewers, it shall appear to the court, grand jury and commissioners of the county that such bridge is necessary, and would be too

expensive for such township or townships, it shall be entered on record as a county bridge: Providing, That this act shall not apply to existing roads and highways.

Section 2. After the entry of any such bridge as a county bridge, it shall be the duty of the commissioners of said county to provide for its erection, in the manner now provided by law for the erection of county bridges: Provided further, That the viewers shall have authority to apportion the cost of such bridge between the county and railroad company, in such proportion as the said viewers deem just and reasonable.

Approved—April 11, 1903. P. L. 164.

A FURTHER SUPPLEMENT to the act approved April fourth, Anno Domini one thousand eight hundred and sixty-eight, entitled "An act to authorize the formation and regulation of railroad corporations."

Section 1. That in order to facilitate the movement of traffic and the interchange of cars between railroads in this Commonwealth, all tracks, which shall hereafter be laid or constructed by companies now or hereafter organized under the act to which this is a supplement, and acts supplementary thereto and amendatory thereof, shall be laid or constructed of the present standard gauge of four feet nine inches, with variations therefrom of not more than one-half inch: Provided, however, That this act shall not apply to companies now or hereafter organized under the act approved March eighteenth, Anno Domini one thousand eight hundred and seventy-five, entitled "A supplement to an act to authorize the formation and regulation of railroad corporations," approved April fourth, Anno Domini one thousand eight hundred and sixty-eight, for the purpose of constructing, maintaining and operating railroads having a gauge not exceeding three feet.

Approved—April 23, 1903. P. L. 280.

AN ACT to amend section one of the act, entitled "An act to provide for increasing the capital stock and indebtedness of corporations," approved the ninth day of February, Anno Domini one thousand nine hundred and one; authorizing corporations to increase their capital stock and indebtedness, and secure the payment of principal and interest of their indebtedness.

Section 1. That the first section of the act, entitled "An act to provide for increasing the capital stock and indebtedness of corporations," approved the ninth day of February, Anno Domini one thousand nine hundred one, which reads as follows:

"Section 1. That the capital stock or indebtedness, or both, of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation. Such increase of either may be made at once or from time to time, as the stockholders aforesaid shall determine," be and the same is hereby amended so as to read as follows:

Section 1. That the capital stock or indebtedness, or both of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each, *without regard to the amount of the other, regardless of any limitation upon the amount of either, prescribed in any general or special law regulating any such corporation*, as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of such corporation. Such increase of either may be made at once or from time to time, as the majority in interest of the stockholders shall determine, as aforesaid; *and upon the authorizing of any such increase of indebtedness by the stockholders of such corporation, in the manner hereinafter provided, it shall be lawful for such corporation to secure the payment of the principal or interest, or both, of all or any part of such indebtedness, by mortgage, deed of trust, or other pledge or conveyance, by way of security, of all or any part of its real and personal property, rights, privileges, and franchises, and in such manner and upon such terms as its board of directors may determine.*

Approved—April 22, 1905. P. L. 280.

AN ACT to empower railroad companies to change the location and grade, or either, of bridges and their approaches belonging to bridge corporations, to accommodate the location and construction of their railroad, or the changing, relocating, widening, straightening, or improvement thereof.

Section 1. That it shall be lawful for any railroad company of this Commonwealth, whenever in the location and construction of its railroad, or in the relocation, widening, or improvement thereof by elevation or depression, or otherwise, it shall, in the judgment of its directors, be necessary, either to avoid grade crossings or to accommodate the scope and purpose of the railroad construction, to change the location of, or to depress or elevate, in whole or in part, any bridge and its approaches belonging to any bridge corporation of this Commonwealth, in such manner as to interfere as little as possible with the convenient use of such bridge and its approaches: Provided, however, That the whole expense of any such change of location or elevation shall be borne and defrayed by the railroad company; and, further, that the railroad company shall be liable for all losses and damages which the bridge company may suffer, or be subjected to, by reason of any such change of location or elevation.

Section 2. That if any additional lands or rights, or easements therein, or materials are necessary or required by such railroad company, in making the change of location, or depression or elevation, of any such bridge or its approaches, hereinbefore authorized, such railroad company is hereby authorized to enter upon, take and appropriate the same.

Section 3. That before such railroad company shall enter upon or take possession of any such bridge and approaches, or any such lands or materials, it shall make ample compensation to such bridge corporation, or owner or owners, or give adequate security therefor, as in this section provided. Where the party or parties cannot agree upon the amount of damages claimed, or, by reason of the absence or legal incapacity of any such owner or owners, no such agreement can be made, such railroad company shall tender a bond, with at least two sufficient individual sureties or one corporate surety, to the party claiming or entitled to any damages, or to the attorney or agent of any person absent, or to the guardian or committee

of any one under legal incapacity; the condition of which shall be, that such company shall pay or cause to be paid such amount of damages as the party shall be entitled to receive, after the same shall have been agreed upon by the parties, or assessed in the manner provided for by this act: Provided, That in the case the party or parties claiming damages refuse to, or do not accept the bond, as tendered, such railroad company shall then give the party a written notice of the time when the same will be presented for filing in court; and thereafter such railroad company may present said bond to the Court of Common Pleas of the county in which such bridge or approaches, or the additional lands or materials necessary or required in making the change of location or elevation of such bridge or its approaches, are situated; and if the bond and sureties or surety are approved, the bond shall be filed in said court, for the benefit of those interested; and recovery may be had thereon for the amount of damages assessed, if the same be not paid, or cannot be made by execution on the judgment in the issue formed to try the question.

Section 4. That when such railroad company cannot agree with the bridge company, or with the owner or owners of any lands or materials, for the compensation proper for the damage done, or likely to be done to, or sustained by, the bridge company, or by the owner or owners of the lands or materials which the railroad company may enter upon, use, appropriate, or take away, in pursuance of the authority hereinbefore given, the Court of Common Pleas of the proper county, on application thereto by petition either by said railroad company or said bridge company, or such owner or owners, as the case may be, or any one in behalf of either, shall appoint seven discreet and disinterested freeholders, of said county, neither of whom shall be residents or owners of property upon or adjoining the line of such railroad, and appoint a time, not less than twenty nor more than thirty days thereafter, for said viewers to meet, at or upon the premises where the damages are alleged to be sustained, of which time and place ten days' notice shall be given by the petitioner to the said viewers and the other party; and the said viewers, or any five of them, having been first duly sworn or affirmed faithfully, justly, and impartially to decide and true report to make concerning all matters and things to be

submitted to them, and in relation to which they are authorized to inquire, in pursuance of the provisions of this act, and having viewed the premises, they shall estimate and determine the damages sustained by the said bridge company, or the quantity, quality, and value of said lands so taken or occupied, or to be so taken or occupied, or the materials so used or taken away, as the case may be; and having due regard to, and making just allowance for, the advantages which may have resulted, or which may seem likely to result, to the said bridge company, or the owner or owners of said land or materials, in consequence of the change of location or elevation of said bridge and its approaches; and, after having made a fair and just comparison of said advantages and disadvantages, they shall estimate and determine whether any and, if any, what amount of damages has been or may be sustained, and to whom payable, and make report thereof to the said court; and if any damages be awarded, and the report be confirmed by the said court, judgment shall be entered thereon; and if the amount thereof be not paid within thirty days after the entry of such judgment, execution may then issue thereon, as in other cases of debt, for the sum so awarded; and the cost and expenses incurred shall be defrayed by the said railroad company; and each of said viewers shall be entitled to one dollar and fifty cents per day, for every day necessarily employed in the performance of the duties herein prescribed, to be paid by such railroad company. The viewers hereinbefore provided for may be appointed before or after the entry upon the said bridge and its approaches, or the said land or materials; and upon the report of said viewers, or any five of them, being filed in said court, either party, within thirty days thereafter, may file its, his, her, or their appeal from said report, to the said court; after such appeal either party may put the cause at issue, in the form directed by said court, and the same shall then be tried by said court and a jury; and after final judgment either party may have a writ of error thereto from the Supreme Court, in the manner prescribed in other cases. The said court shall have power to order what notices shall be given connected with any part of the proceedings, and may make all such orders connected with the same as may be deemed requisite. If any exceptions be filed, with any appeal, to the proceedings, they shall be speedily disposed of, and, if

allowed, a new view shall be ordered, and, if disallowed, the appeal shall proceed as before provided.

Approved—May 4, 1905. P. L. 380.

II.

OPERATION AND MANAGEMENT.

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AN ACT for the protection of railroad travelers, defining the crime of train robbery, and punishing the same.

Section 1. That any person or persons who shall remove, displace or injure any switch, frog, rail, tie, bridge or trestle, or who shall place upon any railroad track any obstruction or explosive substance, or enter into any conspiracy therefor with the design of stopping a train for the purpose of robbery on any railway in the State, and shall there rob, or attempt to rob, maim, wound, injure or kill any passenger, agent, employe, person or persons, or shall rob or attempt to rob any express company, mail pouch, baggage or car of any money or valuable thing whatsoever, either the property of such company, agent, employe or passenger, or other person, or the property of another in his or their care or custody, shall if convicted, be guilty of train robbery, and shall be punished by confinement in the penitentiary for a term of not less than fifteen years.

Approved—June 25, 1895. P. L. 290.

AN Act to further amend an act approved April ninth, one thousand eight hundred and seventy, "requiring railroad, canal, navigation and telegraph companies to make uniform reports to the Auditor-General," which act as amended by the act of April thirteenth, one thousand eight hundred and eighty-nine, extended its provisions to telephone companies and conforming to the requirements of the Constitution provided for the filing of such reports with the Secretary of Internal Affairs, and regulated the time for the filing of the same, which said act is now further amended as to the time of forwarding blanks for such reports; and the provisions of said act are extended to include all corporations owning or operating lines of railways, canals, transportation, telegraphs, or telephones located in whole or in part in Pennsylvania.

Section 1. That the Secretary of Internal Affairs be and he is hereby directed to cause to be made and printed, blank forms for the annual reports of the several railroad, canal, navigation, telegraph and telephone corporations owning, operating or controlling lines of railways, transportation, telegraphs, and telephones in whole or in part in Pennsylvania, referred to in the second section of this act, and the said Secretary of Internal Affairs shall forward by mail or otherwise on or before the first day of June in each year, to each of said corporations, copies of said forms; and when the same shall have been returned to the said Secretary of Internal Affairs, properly filled out and executed as required by the second section of this act, he shall cause the same to be filed in the Bureau of Railways of his department, and published in book form, and cause copies of said report to be transmitted to the Governor and the members of the Legislature, on or before the fifteenth day of January in each year as required by law.

Section 2. That it is hereby made the duty of each railroad, canal, navigation, telegraph and telephone company, or other corporation owning, operating or controlling lines or works in whole or in part within the limits of this State, to make out and return to the Secretary of Internal Affairs a complete report, according to the form to be prescribed by the said Secretary of Internal Affairs, which, among other things, shall embrace in detail the operations and affairs of said corporations, during the fiscal year, together with such other information as the Secretary shall direct. Said report shall be attested by the oath or affirmation of at least two of the following named offi-

cers of the company, president, general manager, superintendent, sequestrator, secretary, treasurer and auditor. That said report shall cover the transactions of each of said corporations for the fiscal year ending on the thirtieth day of June, each year, and shall be filed in the office of the Secretary of Internal Affairs not later than the thirty-first day of August in each year.

Section 3. That every such railroad, canal, navigation, telegraph and telephone company, or other corporation owning, operating or controlling lines of railway, canal, transportation, telegraph or telephone, located in whole or in part in Pennsylvania, that shall refuse or neglect to make such report as herein provided and at the time specified in the second section of this act, shall be liable to a penalty of five thousand dollars to the use of the Commonwealth for every such refusal or neglect, to be sued for and recovered as debts of like amount are or may be by law recoverable.

Approved—April 19, 1897. P. L. 25. Amending Act of April 13, 1889.

AN ACT providing for the making of a sworn copy of book accounts kept by any common carrier, railroad company, chartered storage or transportation company, or other public corporation doing business within this Commonwealth, prima facie evidence in any suit or action in which such accounts are involved in an issue between other parties, and in the result of which such common carrier, chartered storage or transportation company, or other public corporation, has no direct or pecuniary interest, and providing compensation to such common carrier, chartered company or public corporation in such sum as the court may order and direct in the event such books of account are required to be produced.

Section 1. That hereafter in any suit or action brought in any court within this Commonwealth in which the accounts kept by any common carrier, railroad company, chartered storage or transportation company, or other public corporation doing business within this Commonwealth are involved in an issue between other parties, and in the result of which such common carrier, railroad company, chartered storage or transportation company, or other public corporation, has no direct or pecuniary interest, a copy of the books of account of original entry of such common carrier,

railroad company, chartered storage or transportation company, or other public corporation, under the oath or affirmation of an officer or employe in charge of the books of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, filed within ten days of the date of the trial or hearing of the issue in said suit or action, shall be and become prima facie evidence, and the books of such common carrier, railroad company, chartered storage or transportation company, or other public corporation shall not be required to be produced, except upon the allegation of either party to said suit or action of specific errors therein or omission therefrom in writing filed; and in case the party making such allegations shall fail to sustain the same when said books are produced, if required shall pay to such common carrier, railroad company, chartered storage or transportation company, or other public corporation, such reasonable sum as the court may order and direct for expenses incurred, and loss sustained in the production of said books, otherwise the said company or corporation shall not be entitled to any compensation.

Approved—May 25, 1897. P. L. 82.

AN ACT for the better protection of game and game mammals, game birds, song and insectivorous birds, limiting the number of game birds and game mammals to be killed by any one person in one day or in one season, prohibiting the sale of the game and the shipment thereof out of the State, and providing penalties for the violation thereof.

Section 6. It shall not be lawful for any person or persons, railroad company, express company, stage driver or any company or corporation, or person or persons acting in the capacity of a common carrier, their officers or employes, to knowingly receive for transportation or transport or remove beyond the limits of the State any of the game birds or game mammals mentioned in this act.

Approved—June 4, 1897. P. L. 123.

AN ACT providing for the payment to the county or counties of the moneys or bonus which any foreign railway corporation is required to pay into the State Treasury for the right to pass through said county or counties, and by which payment such foreign railway corporation is relieved from local taxation.

Section 1. That wherever by provision of law a railway corporation of any other State is required to pay a bonus into the State Treasury for the right of passing through one or more counties of this Commonwealth, and by virtue of the payment of such bonus is relieved from the payment of local taxes in the district through which its lines are located, the money so paid into the State Treasury shall be paid to the county or counties through which said lines are located, and the county commissioners shall have discretionary authority to use the same for county purposes, or to divide the whole or any part thereof among the districts in their respective counties for the purpose of relieving such districts from the oppressive taxation that exists on account of the exemption of the property of such foreign railway corporations from local taxation.

Section 2. On receipt of the bonus or money referred to by the State Treasurer, it shall be the duty of the Auditor General to draw his warrant upon the State Treasurer for the amount thereof, said warrant to be made to the order of the treasurer of the county through which said foreign railway corporation has located its lines: Provided that where such foreign railway corporation has located its lines through more than one county, the money or bonus aforesaid shall be divided among the counties, the division being made in proportion to the assessed valuation of the real estate of said counties, and the warrants of the Auditor General shall be drawn in accordance with such divisions.

Section 3. All acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

Approved—May 11, 1899. P. L. 289.

AN ACT creating and defining the offence of disorderly conduct by persons on railroad and railway cars, public or private parks, and picnic grounds kept for the amusement of the public in this Commonwealth, and fixing the penalties for the commission of such offence.

Section 1. That if any person or persons shall wilfully make or cause to be made any loud, boisterous and unseemingly noise, or by using obscene or profane language disturb and annoy any one who shall be passengers upon

any railroad or railway car, or who may be visitors at any public or private park, or picnic grounds kept for the amusement of the public in this Commonwealth, whereby through such conduct the public peace is broken or disturbed or the public annoyed, he, she or they shall be guilty of the offence of disorderly conduct; and upon conviction thereof before any magistrate, justice of the peace, alderman, mayor, or burgess, shall be sentenced to pay the cost of prosecution, and to forfeit and pay a fine not exceeding ten dollars; and in default of the payment thereof, shall be committed to and imprisoned in the county jail of the proper county for a period not exceeding thirty days.

Section 2. It shall be the duty of all magistrates, justices of the peace, aldermen, mayors, and burgesses to pay over to the treasurer of their respective counties all fines or forfeits collected by virtue of this act, quarterly, on or before the first Monday of March, June, September, and December of each year, and at the expiration of their term of office.

Approved—May 21, 1901. P. L. 286.

AN ACT in relation to abandonment of portions of railroads.

Section 1. That if any railroad company shall hereafter, for a period of six consecutive months, omit to operate any portion or portions of its railroad, such railroad company shall be deemed to have abandoned, and shall not have the right to maintain and operate, such portion or portions, but shall be confined in the exercise of its franchises to the remaining portion or portions of its railroad: Provided, however, That this act shall not apply to passenger railway companies, whether surface, elevated or underground roads.

Approved—March 5, 1903. P. L. 13.

AN ACT to prevent and punish the stealing of wire forming part of a line for the transmission of electricity.

Section 1. That if any person shall steal or attempt to steal, or cut or break with intent to steal, any wire forming part of the line or system of any telegraph company, telephone company, electric light company, electric traction company, electric rail-

way, or of any other company, individual, partnership, or corporation, engaged in transmitting electricity by wire for any purpose; or shall be accessory, before or after the fact, to such stealing, attempt to steal, or cutting or breaking with intent to steal, any such wire; such person shall be deemed guilty of a felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

Approved—March 8, 1905. P. L. 33.

AN ACT authorizing vacation of public highways at grade crossings over railroads, and the opening of undergrade or overgrade crossings in lieu thereof, by the court of quarter sessions.

Whereas, The vacation of grade crossings over railroads, and substitution of undergrade or overgrade crossings, will prevent destruction of life and property, and is demanded by public policy; but, owing to the laws of the State relating to opening and vacating of public highways, is attended with delays, and is often impracticable; therefore:

Section 1. That wherever any railroad is or shall be crossed at grade by a public road, street, or highway, and the railroad company shall have constructed or shall construct, or there shall have been or shall be constructed by others, with such company's consent, an undergrade subway or an overgrade bridge or crossing, sufficiently near said public crossing to reasonably accommodate the traveling public, the Court of Quarter Sessions of the county in which the said crossing exists, upon petition of said railroad company or other persons, may, if satisfied that said undergrade subway or overgrade bridge or crossing reasonably accommodates the traveling public, after notice to any corporation using or occupying or authorized to use or occupy the street, proposed to be vacated, with tracks, wires, pipes or conduits, and, by rule to show cause, to the supervisors if the said crossing is in a township, or to the burgess or mayor if said crossing is in a borough or city, and after testimony, taken either in open court or by deposition, as the court may direct, order that said road, street, or highway where it crosses said railroad at grade, and its approaches on both sides,

shall be vacated, and that the said undergrade crossing or subway or the overgrade bridge or crossing and its approaches on both sides, substituted therefor, shall be a public highway, and be maintained by the proper authorities; and any company which had rights in or upon the street so vacated shall have, and be permitted to exercise, the same rights upon said streets, highways, bridges, and subways so opened, and to connect the same with its system without obtaining further authority or consent.

Section 2. All acts or parts of acts in any manner conflicting with the provisions of this act are hereby repealed.

Approved—April 22, 1905. P. L. 295.

III.

CONSOLIDATION, MERGER AND HOLDING OF STOCK.

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AN ACT to provide for the incorporation and regulation of ship canal companies to connect the great lakes with points on navigable rivers of this Commonwealth.

Section 22. No canal corporation organized or operated under this act, nor the lessees, purchasers or managers of any such corporation, shall consolidate the stock, franchises or property of such corporation with any railroad or other canal corporation owning a parallel or competing line, nor shall such canal corporation lease, purchase, or in any way control, or be leased, purchased or controlled, directly or indirectly, by any corporation owning or representing a parallel or competing line of transportation, nor shall any officer of such corporation be an officer of any railroad or other canal corporation owning a parallel or competing line, and the question whether such canals or railroads are parallel or competing lines, and whether any such control as is hereby prohibited has been established, directly or indirectly, shall, when demanded by the party complainant, be decided by a jury upon proof and judgment of any such consolidation, lease, purchase or control, direct or indirect, of parallel and competing lines as is hereby prohibited,

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the officers, managers and directors by whom such prohibited act is performed or carried out, shall each be subject to a fine of one hundred dollars for each day that such prohibited consolidation, lease, purchase or control is in force or effect; and any person injured thereby shall be entitled to recover from the corporation offending, damages to three times the amount of pecuniary loss shown upon the second judgment or conviction showing such consolidation, lease, purchase or control of any canal corporation by parallel and competing railroads or canals, then all shares of such corporation by the ownership of which such prohibited consolidation, lease, purchase or control, is effected or maintained shall be forfeited to the State; and it shall be the duty of the Attorney General to enforce such forfeiture by the proper proceedings. In case of such forfeiture of the shares of any canal corporation for violation of this section, the minority stockholders upon proof of their innocence of and protest against such prohibited consolidation or control, shall be permitted to independently control and manage the property of such canal. The State shall receive all dividends or profits on the forfeited shares, but such shares forfeited to and owned by the State shall not be voted at the elections for directors or officers of such canal corporations, unless the property of such corporation is previously acquired by the State for legal compensation, to be divided among all shareholders in proportion to their ownership of shares, the State receiving its proper proportion of such compensation for all shares forfeited and held by it under this provision. Any contract, agreement, arrangement, understanding or ownership of stock, personally or by agents or otherwise, in any canal corporation organized or operated under this act, by which the property of such corporation shall fail to be operated as an independent and competing route of transportation, shall be held to be a violation of this section and subject to the penalties and forfeitures hereinbefore presented.

Approved—June 24, 1895. P. L. 221. This act applies only to ship canals.

AN ACT to authorize and empower any railroad corporation of this Commonwealth, which shall own at least two-thirds of the whole capital stock of any other like corporation of this Commonwealth, and shall

have a railroad connecting with the railroad of the latter, to acquire the franchises, property, rights and credits of the latter.

Section 1. That it shall be lawful for any railroad corporation of this Commonwealth, having a railroad connecting with that of any other like corporation, and owning at least two-thirds of the capital stock of the latter, to acquire in the manner hereinafter provided, and thereafter be possessed of, own, hold, exercise and enjoy, all the franchises, corporate property, rights and credits then possessed, owned, held or exercised, by said last mentioned vendor corporation.

Section 2. Such acquisition shall be affected in the manner and upon the conditions hereinafter stated, to wit:

First. The corporations shall, pursuant to resolution duly adopted by the directors of each, make and execute under their respective corporate seals, duly attested, an agreement providing for such acquisition and sale, specifying all essential details, terms, stipulations and conditions thereof, and particularly showing the number of outstanding shares of capital stock of the vendor corporation, the amount fixed as the price or value per share thereof, and the mode by which the respective holders shall receive payment for the same, and with a map of the railroad to be acquired thereunder, annexed and made part thereof.

Second. Said agreement, after due notice is given all directors of such corporation or corporations, shall be submitted for approval or disapproval to the stockholders of each corporation at separate meetings, either annual or special, duly convened, and if said agreement shall be approved by a majority of the stockholders of each corporation, present at such meeting, then that fact shall be certified by the secretary of each corporation under its corporate seal, and a copy of the agreement, with said certificates attached, shall be filed in the office of the Secretary of the Commonwealth; and immediately upon the filing thereof all the corporate rights, franchises and privileges, and all the corporate property, real, personal and mixed, rights and credits, owned, possessed, held, used, or otherwise exercised by the vendor corporation, shall (subject, however, to full payment, in the manner prescribed by said agreement, of the stipulated price or value of the whole capital stock of

said vendor corporation,) become and be vested in the acquiring corporation, subject to all the debts, liabilities and duties of said vendor corporation, and shall thereafter be possessed, held, used, exercised and enjoyed by said acquiring corporation, as fully completely and absolutely in all respects as the same had been theretofore owned, held, exercised and enjoyed by said vendor corporation; and said acquiring corporation may also, with respect to the property so acquired, have, exercise and enjoy all the rights, powers, privileges and franchises which it has and may exercise respecting its other railroads and property. Upon the filing in the office of the Secretary of the Commonwealth of said copy of agreement and attached certificates, as herein required, the capital stock of said vendor corporation shall be wholly extinguished by payment, in the mode prescribed in said agreement, of the stipulated price or value thereof, and all certificates representative thereof shall be delivered to the acquiring corporation for immediate cancellation, and all the corporate rights, franchises, privileges and property of every kind, acquired under said agreement, shall thereafter be represented by the capital stock of the acquiring corporation, and thereupon the corporate existence of the said vendor corporation shall terminate.

Section 3. That the copy of said agreement with said certificates attached, filed in the office of the Secretary of the Commonwealth, shall be evidence of the lawful holding of the meetings of stockholders of each corporation, and of the due approval of the said agreement as required by this act, as well as the precedent action of the directors of each approving thereof. If any stockholder or stockholders of the railroad corporation, whose franchises, corporate property, rights and credits are acquired under said agreement, shall be dissatisfied with said acquisition, and the terms and conditions thereof contained in said agreement, then it shall and may be lawful for any such stockholder or stockholders, within thirty days after the filing of said agreement in the office of the Secretary of the Commonwealth, to apply by petition to the Court of Common Pleas of the county in which the chief office of the said last mentioned company may be situated to appoint three disinterested persons to estimate and appraise the damage, if any, which

such stockholder or stockholders shall suffer or sustain by reason of the purchase and acquisition provided for by said agreement, and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons, so appointed, shall also appraise the share or shares of said stockholders in the said company, at the market value thereof, without regard to any depreciation resulting from said purchase and acquisition, and the said company may, at its election, either pay to the said holder the amount of damages so found or the value of the stock so ascertained, and upon payment of the value of the stock, as aforesaid, the same shall be transferred to and be vested in said acquiring company.

Section 4. In connection with and upon consummation of such acquisition, as aforesaid, the acquiring company may issue its own then authorized capital stock or its own bonds, either or both, at not less than the par or face value thereof, to such amount as may be required by said agreement, or as may be found otherwise necessary for paying and extinguishing the outstanding capital stock and bonded indebtedness, or either, of the corporation whose rights, property and franchises are so acquired.

Approved—March 22, 1901. P. L. 53.

AN ACT to enforce the provisions of section four of article seventeen of the Constitution.

Section 1. That no railroad, canal or other corporation of this State, or the lessees, purchasers or managers of any such railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or hold a majority of the stock of, or in any other way control, any other railroad or canal corporation, organized under the laws of this State, owning or having under its control within this State a parallel or competing line; nor shall any officer of such railroad or canal corporation of this State act as an officer of any other railroad or canal corporation of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues:

Provided, That none of the prohibitions of this act shall apply where one railroad or canal corporation owns a majority of the stock of another railroad or canal corporation, which it held before the adoption of the present Constitution, nor where a railroad corporation has furthered or shall further the construction of a line parallel and competing with its own, by subscribing to a majority of the stock of a corporation organized for that purpose.

Section 2. That any violation or attempted violation of the provisions of this act may be attacked or restrained by appropriate proceedings at law or in equity, at the instance of the Commonwealth acting through the Attorney General, and that any such violation shall also constitute a misdemeanor, for which the offending corporation, as well as the president, vice president and members of the board of directors participating therein, may be indicted and punished, separately or collectively.

Approved—April 4, 1901. P. L. 61.

AN ACT supplementary to an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, one thousand eight hundred and seventy-four; providing for the merger and consolidation of certain corporations.

Section 1. That it shall be lawful for any corporation now or hereafter organized under, or accepting the provisions, of the act, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, or of any of the supplements thereto, or of any other act of Assembly authorizing the formation of corporations, to buy and own the capital stock of, and to merge its corporate rights, powers and privileges with and into those of, any other corporation, so that by virtue of this act such corporations may consolidate, and so that all the property, rights, franchises and privileges then by law vested in either of such corporations, so merged, shall be transferred to and vested in the corporation into which such merger shall be made: Provided, That nothing in this act shall be construed so as to permit railroad, canal, telegraph companies, which own, operate or in any way

control parallel or competing roads, canals or lines, to merge or combine: And provided further, That any corporation formed for the purpose of carrying on any manufacturing business under the seventeenth or eighteenth clause of section two of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, with the powers conferred by section thirty-eight or section thirty-nine of said act, may be merged and consolidated, under the provisions of this act, with any other corporation formed for any purpose provided for in either the seventeenth or eighteenth clause of section two of the act above cited; but nothing in this act contained shall extend or enlarge beyond its former territorial limits the exclusive franchise of any gas or water company.

Section 2. Said merger or consolidation shall be made under the conditions, provisions and restrictions, and with the powers herein set forth, to wit:

I. The directors of each corporation may enter into a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporations; prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of said corporations into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect the said consolidation and merger; but said agreement shall not be effective unless the same shall be approved by the stockholders of said corporations, in the manner hereinafter provided.

II. Said agreement shall be submitted to the stockholders of each of said corporations, at separate special meetings, of the time, place and object of which respective meetings due notice shall be given by publication, once a week for two successive weeks before said respective meetings, in at least one newspaper in the county or each of the counties in which the

principal offices of said respective corporations shall be situate; and at said meetings the said agreement of the directors shall be considered, and a vote of the stockholders in person or by proxy shall be taken, by ballot, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote; and if a majority in amount of the entire capital stock of each of said corporations shall vote in favor of said agreement, merger and consolidation, then that fact shall be certified by the secretary of each corporation, under the seal thereof, and said certificates, together with the said agreement or a copy thereof, shall be filed in the office of the Secretary of the Commonwealth, whereupon the said agreement shall be deemed and taken to be the act of consolidation of said corporations.

Section 3. Upon the filing of said certificates and agreement, or copy of agreement, in the office of the Secretary of the Commonwealth, the said merger shall be deemed to have taken place, and the said corporations to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges and franchises theretofore vested in each of them, and all the estate and property, real and personal, and rights of action of each of said corporations, shall be deemed and taken to be transferred to and vested in the said new corporation without any further act or deed: Provided, That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties and liabilities had been contracted by it. But such merger and consolidation shall not be complete, and no such consolidated corporation shall do any business of any kind, until it shall have first obtained from the Governor of the Commonwealth new Letters Patent, and shall have paid to the State Treasurer a bonus of one-third of one per centum upon all its capital stock in excess of the amount of capital stock of the several corporations so consolidating, upon which the bonus required by law had been theretofore paid.

Section 4. A certified copy of said certificate and agreement,

or copy of agreement, so to be filed in the office of the Secretary of the Commonwealth, shall be evidence of the lawful holding and action of such meetings, and of the merger and consolidation of said corporations.

Section 5. If any stockholder or stockholders of any corporation which shall become a party to an agreement of merger and consolidation hereunder, shall be dissatisfied with or object to such consolidation, and shall have voted against the same at the stockholders' meeting, it shall and may be lawful for any such stockholder or stockholders, within thirty days after the adoption of said agreement of merger and consolidation by the stockholders as herein provided, and upon reasonable notice to said corporation, to apply by petition to any Court of Common Pleas of the county in which the chief office of such corporation may be situate, or to a judge of said court in vacation, if no such court sits during said period, to appoint three disinterested persons to estimate and appraise the damages, if any, done to such stockholder or stockholders by said consolidation. Upon such petition, it shall be the duty of said court, or judge, to make such appointment; and the award of the persons so appointed, or of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise the share or shares of said stockholders in the said corporation, at the full market value thereof, without regard to any appreciation or depreciation in consequence of the said consolidation, which appraisal, when confirmed by the said court, shall be final and conclusive; and the said corporation may, at its election, either pay to the said stockholder or stockholders the amount of damages so found and awarded, if any, or the value of the stock so ascertained; and upon the payment of the value of the stock as aforesaid, the said stockholder or stockholders shall transfer the stock so held by them to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the other stockholders; and in case the value of said stock, as aforesaid, shall not be so paid within thirty days after the said award shall have been confirmed by said court, the damages so found and confirmed shall be a judg-

ment against said corporation, and may be collected as other judgments in said court are by law recoverable.

Approved—May 29, 1901. P. L. 349.

AN ACT to amend an act, entitled "An act authorizing railroad and other transportation corporations of this State to acquire, hold, dispose of, and guarantee the stock and securities of certain other corporations of this State or elsewhere," approved April fourth, one thousand nine hundred and one.

Section 1. That it shall be lawful for any railroad or other transportation corporation created by or existing under the laws of this Commonwealth, from time to time to acquire, own and hold, pledge, sell, or otherwise dispose of, the stock, bonds and other securities, or either, and to guarantee the stock, bonds and other securities, or either, of any corporation of this Commonwealth or elsewhere, engaged in the business of transportation, either on land or water, *or owning an actual majority of the stock entitled to vote of any corporation so engaged*, and also of any other warehouse, storage, elevator or terminal company, whose business is incidental to the business of transportation in which the purchasing or guaranteeing corporation shall be authorized to engage.

Approved—April 23, 1903. P. L. 280. Amending Act of April 4, 1901.

AN ACT providing for the voting of shares of stock in corporations in this Commonwealth, held by executors, administrators, guardians, and trustees, and the manner of voting the same.

Section 1. That from and after the passage of this act, executors, administrators, guardians, and trustees, whether created by last will and testament or by decree of the proper court, shall have the same right and power, either in person or by proxy, at all corporate meetings, to vote any and all shares of stock, by them held in such fiduciary capacity, in any corporation in this Commonwealth or organized under the laws of the same, as the deceased, or legal owner thereof had in his lifetime or during his legal ownership thereof. And where such stock is certified, or stands on the books of such corporation in the name of, or has passed by operation of law or by virtue

of any last will and testament to, more than two such executors, administrators, guardians or trustees, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such executors, administrators, guardians and trustees, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted.

Approved—March 16, 1905. P. L. 42.

AN ACT to amend the first section of an act, entitled "An act to provide for the manner of reducing the capital stock of corporations," approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-three (1893); extending the provisions of the said act to all corporations created by general or special law, and repealing all acts or parts of acts inconsistent therewith.

Section 1. That the first section of an act, entitled "An Act to provide for the manner of reducing the capital stock of corporations," approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-three (1893), which reads as follows:

"Section 1. Be it enacted, &c., That the capital stock of any corporation may be reduced, from time to time, by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such company, provided that such reductions shall not be below the amount of capital stock required by law for the formation of such company," be and the same is hereby amended to read as follows:

Section 1. Be it enacted, &c., That the capital stock of any corporation *created by general or special law* may be reduced, from time to time, by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such corporation, provided that such reduction shall not be below the minimum amount of capital stock required by law for the formation of *corporations formed for similar purposes*.

Section 2. All acts or parts of acts inconsistent herewith are hereby repealed.

Approved—April 22, 1905. P. L. 264.

AN ACT to authorize railroad companies of this Commonwealth, in order to secure an adequate supply of water for their corporate purpose, to acquire, hold, dispose of, and guarantee the stock and securities of water companies.

Section 1. That in order to enable railroad companies of this Commonwealth to secure an adequate supply of water for their necessary corporate purposes, they are hereby authorized, from time to time, to acquire, own and hold, pledge, sell or otherwise dispose of, the stock, bonds and other securities, or either, and to guarantee the stock, bonds and other securities, or either, of water companies.

Approved—April 22, 1905. P. L. 264.

IV.

STREET RAILWAYS.

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AN ACT authorizing street passenger railway companies, whose line or lines are not on township or country roads, to enter into contracts with traction or motor power companies, which contracts may provide for the lease, for the sale and for the operation of all or of any part of their property and franchises, and for the construction of necessary cables, motors, apparatus and appliances to be paid for by mortgage bonds and otherwise.

Section 1. That any street passenger railway company heretofore or which may hereafter be incorporated in this Commonwealth, under general or special laws, whose line or lines are not on township or country roads, is hereby authorized to sell or to lease, or to lease and to sell its property and franchises to any traction or motor power company incorporated under the laws of this Commonwealth, not operating a line or lines of railway on township or country roads, upon such terms as shall be agreed upon. Any such

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railway company may also contract with any such traction or motor power company or companies for the construction upon and along its line of railway, and that of any companies operated or controlled by it, whose line or lines are not on township or country roads, of motors, cables, electric or other apparatus and appliances, and for the payment of the price thereof by bonds to such extent as may not exceed its issued full paid capital stock, secured, if it shall be deemed advisable, by mortgages of its franchises and property. Contracts may also be entered into between such companies for the operation of the lines of railway of such railway companies by such traction or motor power companies as operators, lessees, or otherwise, by means of cables, electric and other appliances and fixtures, and also by means of any motive power which could lawfully be used upon the line owned, leased or operated by said railway company: Provided, That nothing herein contained shall be construed as permitting the propulsion of cars along the line of any street passenger railway by means of steam: And provided, further, That no traction or motor power company shall enter upon any of the streets or highways of any city or borough for the construction thereon of any of the appliances or fixtures necessary to operate any street passenger railway company by cables, electricity or mechanical device or power, until after the consent of the municipal or local authorities shall be given to an entry upon such streets or highways for the purpose of such construction.

Approved—May 15, 1895. P. L. 63.

AN ACT authorizing traction or motor power companies to enter into contract with each other for the sale, lease and operation of their respective property and franchises.

Section 1. That any traction or motor power company heretofore or hereafter incorporated under the laws of this Commonwealth is hereby authorized to sell or to lease, or to lease and to sell its property and franchises, as well as those owned, as those leased, operated or controlled by it, including so much of any line or lines of passenger railways owned, leased or controlled by it as is located upon street or streets, to any other traction or motor power company incor-

porated under the laws of this Commonwealth, upon such terms as may be agreed upon. Such traction or motor power company may also enter into contracts with other traction or motor power companies incorporated under the laws of this Commonwealth for the operation of lines of railway and property owned, leased, operated or controlled by it: Provided, That nothing herein contained shall be construed as authorizing any traction or motor power company to acquire, lease or operate so much of the line of any other motor power company as occupies any township, borough or county road.

Approved—May 15, 1895. P. L. 64.

AN ACT authorizing traction or motor power companies and street passenger railway companies owning, leasing, controlling or operating different lines of street railways, to operate all of said lines as a general system, and to lay out such new routes or circuits over the whole or any part of any street or streets occupied by such different companies, and to run cars thereon for such distances and in such directions as will in the opinion of the operating company best accommodate public travel.

Section 1. That from and after the passage of this act it shall be lawful for any traction or motor power company, or street passenger railway company, owning, leasing, controlling or operating different lines of street railways of different companies, to operate as a general system so much of said different lines as occupy streets, and from time to time to lay out such new routes or circuits over the whole or any part of such street or streets occupied by the tracks of the different companies which it thus owns, leases, controls or operates, and upon such routes or circuits to run cars for such distances, and in such directions, as will in the opinion of the operating company best accommodate public travel: Provided, That nothing in this act contained shall be construed to give any traction or motor power company, or street passenger railway company any authority to run its cars upon the tracks of any street passenger railway company not owned, leased, controlled or operated by it without the consent of such company, or the consent of the traction or motor power company, owning, leasing, controlling or operating such company: Provided, however, That such consent by any traction or motor

power company leasing, controlling or operating such street passenger railway company, shall not be given for any longer term than is covered by the agreement for such lease, control or operation.

Approved—May 15, 1895. P. L. 65.

AN ACT to amend an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, increasing the length of the tracks of other companies that may be used, authorizing the carrying and distribution of mails of the United States, and the abandonment of portions of street railways.

Section 14. Any passenger railway company incorporated under this act shall have the right to use such portion of the single or double tracks of any other company incorporated under this act, and already laid down, as may be necessary either to construct a circuit upon its road or to connect with the road of any passenger railway company already in existence, agreeing by itself or through its lessees or operating company to make such connection. The length of tracks to be used shall be used only with the consent of the local authorities of the city, borough or township, and in no event shall exceed two thousand five hundred feet in length of street or highway; and said company shall have the right to replace, at its own expense, such tracks with new tracks and appliances necessary for the proper operation of the cars of both companies over and upon said tracks. Before any such use occurs compensation shall be paid to the corporation owning the track laid. In case of disagreement, the Court of Common Pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view and assess the damages and return thereof make to the court, with the right of appeal now secured under section eight of article sixteen of the Constitution, and of an act for the further regulation of appeals from assessment of damages to owners of property taken for public use, passed June thirteen, one thousand eight hundred and seventy-four. If an appeal shall be taken, it shall be competent to pay into court the amount of such award, upon which payment the right to use said tracks shall vest, and said sum shall await the final judgment on said appeal.

Section 15. No street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough or township, without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder, which shall not have a continuous route from the beginning to the end, excepting the twenty-five hundred feet authorized to be used under section fourteen as amended by the provisions of this act.

Section 3. That hereafter any company now or hereafter incorporated under the provisions of an act, entitled "An Act to provide for the incorporation of street railway companies in this Commonwealth," approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, in addition to conveying passengers, shall also have the power and authority to contract for and to locally gather, carry and distribute the mails of the United States.

Section 4. Any company incorporated under the provisions of an act entitled "An Act to provide for the incorporation and government of street railway companies in this Commonwealth," approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, is hereby authorized and empowered, with the consent of the authorities of the municipality within which said railway is located, to abandon any portion of its road, without prejudice to its rights to operate, or to complete and operate the remaining portion of its railway by appropriate action by its board of directors, with the approval of a majority in value of its stockholders, upon the filing of a copy of such action, certified under the hand of its president and secretary and the seal of the company, in the office of the Secretary of the Commonwealth, and also with the proper municipal authorities.

Approved—May 21, 1895. P. L. 93. Amending Act of May 14, 1889.

AN ACT to amend section three of an act, entitled "An act to provide for the incorporation and regulation of motor power companies for operating passenger railways, railways by cables, electrical or other means," approved the twenty-second day of March, Anno Domini one thousand eight hundred and eighty-seven, providing for the issuing of bonds secured by mortgage to an amount equal to the capital stock of the corporation paid in.

Section 3. It shall be lawful for all corporations named in this act to borrow money to secure any indebtedness created by them, by issuing bonds with or without coupons attached thereto, and to secure the same by a mortgage or mortgages, for the use of the bondholders, upon their property, real and personal, and their franchises, to an amount not exceeding the capital stock of the corporation paid in, and at a rate of interest not exceeding six per centum.

Approved—July 2, 1895. P. L. 430. Amending Act of March 22, 1887, relating to motor power companies.

A SUPPLEMENT to "An act to provide for the incorporation and regulation of motor power companies for operating passenger railways by cables, electrical or other means," approved the twenty-second day of March, Anno Domini one thousand eight hundred and eighty-seven, to provide that companies chartered thereunder, which did not file the original certificate with all of its endorsements in the office for recording deeds in and for the proper county, may within thirty days from the passage of this act be allowed to do so, with the same effect as if it had been filed as soon as letters patent were issued.

Section 1. That any corporation to which letters patent may have been issued under the act of assembly of the twenty-second day of March, Anno Domini one thousand eight hundred and eighty-seven, whose original certificate with all of its endorsements has not been recorded in the office for recording deeds in and for the proper county, as required by the second section of the said act of Assembly, may at any time within thirty days from the passage of this act have the said certificate recorded in the office for recording deeds in and for the proper county, and the recording of the same shall have the same effect as if it had been recorded immediately after letters patent were issued, and no act of the said corporation shall be deemed invalid or void by reason of the failure to so record the original certificate before it did any corporate act or thing.

Approved—April 28, 1899. P. L. 116.

AN ACT to further amend an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, and the amendments thereto,

approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five; and providing for the length of tracks of any companies that may be used by another company; for the use by any company of streets, highways and bridges which have been abandoned, or may be abandoned, or are not in use by any other companies, chartered or authorized to use the same, or which are not in constant daily use for the transportation of passengers by such companies; and for the use of streets, highways and bridges by any company, which other companies have relinquished the right to use, or which are only in temporary use, either by virtue of the provisions of any act of Assembly, or of any ordinance of council, or of any contract or agreement with the Commonwealth or the local authorities of any city, borough or township, and providing compensation therefor; limiting the time within which application must be made to the local authorities of any city, borough or township, within which work must be commenced and the railway completed; and providing that where a company shall receive a charter to build a road on any street or highway, no other charter shall be granted to any other company to occupy the same street or highway, until after the time given to the first company to obtain the consent of the local authorities and begin and complete its work, shall have elapsed; conferring the right to acquire property by purchase, for certain uses of the corporation.

Section 1. That section one of an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved May fourteen, one thousand eight hundred and eighty-nine, which reads as follows:

"Section 1. That any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway, on any street or highway upon which no track is laid, or authorized to be laid or to be extended under any existing charter, with the privilege of occupying so much of any street, *used or authorized to be used, under any existing charter*, as is hereinafter provided, for public use in the conveyance of passengers, by any power other than by locomotives; *and for that purpose* may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the length of such road, as near as may be, the streets and highways upon which the said railway is to be laid and constructed, showing also the circuit of the route, the amount of the capital stock of the company, which shall not be less than six thousand

dollars to every mile of road proposed to be constructed, and the number of shares of which said capital stock is to consist, and the names and places of residence of a president and not less than four nor more than twelve directors of the company, who shall manage its affairs until the first annual meeting thereafter and until others are chosen in their places; each subscriber to such articles of association shall subscribe thereto his name, place of residence and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the second section of this act, such articles of association shall be acknowledged by at least three of the directors, before some officer competent to take acknowledgments of deeds, and may be filed in the office of the Secretary of the Commonwealth, who shall endorse thereon the day on which they were filed and record the same in a book to be provided by him for that purpose, whereupon the Governor shall issue his letters patent, creating the persons who have so subscribed such articles of association and all persons who shall become stockholders in such company, a corporation by the name specified therein, and shall possess the power and privileges following, namely:

"First. To have succession by its corporate name for the period limited in its articles of association.

"Second. To sue and be sued, complain and defend, in any court of law or equity.

"Third. To make and use a common seal and alter the same at pleasure.

"Fourth. To hold, purchase and convey, subject to existing laws, such real and personal estate as the purposes of the corporation shall require, *not exceeding the amount limited in the articles of association.*

"Fifth. To appoint such officers and agents as the business of the corporation shall require and to allow them a suitable compensation.

"Sixth. To make by-laws, not inconsistent with the Constitution or any existing laws, for the management of its property and regulation of its affairs, and for the transfer of its stock," be and the same is hereby amended so as to read as follows:

Section 1. That any number of persons, not less than five, may form a company for the purpose of constructing, maintain-

ing and operating a street railway for public use in the conveyance of passengers, by any power other than locomotive, on any street or highway upon which no track is laid, under any existing charter, *and in constant daily use for the transportation of passengers at the time of the application by another company for a charter to use such street*, with the privilege of occupying so much of any other street, highway or bridge as is hereinafter provided; but *whenever a charter, after the approval of this act, shall be granted to any corporation to build a road as provided by this act, no other charter to build a road on the same streets, highways, bridges or property shall be granted to any other company within the time during which, by the provisions of this act, the company first securing the charter has the right to commence and complete this work: Provided, That the consent of the local authorities shall be promptly applied for, and shall have been obtained within two years from the date of the charter; for the purpose of such formation said persons may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the length of such road, as near as may be, the streets, highways and bridges upon which the said railway is to be laid and constructed, showing also the circuit of the route, the amount of the capital stock of the company, which shall not be less than six thousand dollars to every mile of road proposed to be constructed, and the number of shares of which said capital stock is to consist, and the names and places of residence of a president and not less than four nor more than twelve directors of the company, who shall manage its affairs until the first annual meeting thereafter and until others are chosen in their places; each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company.* On compliance with the provisions of the second section of this act, such articles of association shall be acknowledged by at least three of the directors, before some officer competent to take acknowledgments of deeds, and may be filed in the office of the Secretary of the Commonwealth, who shall endorse thereon the day on which they were filed and record the same in a book to be provided by him for that purpose; whereupon the Governor shall issue his letters patent,

creating the persons who have so subscribed such articles of association and all persons who shall become stockholders in such company, a corporation by the name specified therein, and shall possess the powers and privileges following, namely:

First. To have succession by its corporate name for the period limited in its articles of association.

Second. To sue and be sued, complain and defend, in any court of law or equity.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To *take*, hold, purchase, *operate*, *lease* and convey such real and personal *property*, estate and *franchises*, as the purposes of the corporation shall require.

Fifth.—To appoint such officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

Sixth. To make by-laws, not inconsistent with the constitution or any existing laws, for the management of its property and regulation of its affairs, and for the transfer of its stock.

Seventh. To sell or lease their road and franchises, or parts thereof, to traction or motor power companies, or to other passenger railway companies, or to acquire the roads, property and franchises of other passenger railway companies by lease or purchase.

Section 2. That section four of an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, which reads as follows:

"Section 4. Any company incorporated under this act, shall have authority to construct such extensions or branches as it may deem necessary to increase its business and accommodate the travel of the public: Provided, That the act of the company authorizing any extension or branch, shall distinctly name the streets and highways on which said extension or branch is to be laid and constructed, and a copy of the minutes of said company containing said authority shall be recorded in the office of the Recorder of Deeds for the proper county, and an exemplification of the said record shall be filed in the office of the Secretary of the Commonwealth, and no right to actually

construct the same shall vest until after thirty days from the filing of said exemplification: And provided, That no extension or branch shall be constructed on any street or highway on which a track is laid *or authorized* under any existing charter, except as hereinafter provided," be and the same is hereby amended so as to read as follows:

Section 4. Any company incorporated under this act, shall have authority to construct such extensions or branches as it may deem necessary to increase its business and accommodate the travel of the public: Provided, That the act of the company authorizing any extensions or branches, shall name the streets, highways *and bridges* on which each extension or branch is to be laid and constructed, and a copy of the minutes of said company, containing said authority, shall be recorded in the office of the Recorder of Deeds for the proper county, and an exemplification of the said record shall be filed in the office of the Secretary of the Commonwealth; and no right to actually construct the same shall vest until after thirty days from the filing of said exemplification: And provided, That no extension or branch shall be constructed on any street or highway upon which a track is laid *and in constant daily use for the transportation of passengers*, under any existing charter, at the time of the *filing of such exemplification*, except as hereinafter provided.

Section 3. That section fourteen of an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, as amended by an act, entitled "An act to amend an act, entitled 'An act to provide for the incorporation and government of street railway companies in this Commonwealth,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, increasing the length of the tracks of other companies that may be used, authorizing the carrying and distribution of mails of the United States, and the abandonment of portions of street railways," approved the twenty-first day of May, one thousand eight hundred and ninety-five, which reads as follows:

"Section 14. Any passenger railway company incorporated under this act shall have the right to use such portion of the

single or double tracks of any other company incorporated under this act, and already laid down, *as may be necessary either to construct a circuit upon its road or to connect with the road of any passenger railway company already in existence, agreeing by itself or through its lessee or operating company to make such connection.* The length of tracks to be used, shall be used only with the consent of the local authorities of the city, borough or township, and in no event shall exceed two thousand five hundred feet in length of street or highway; and said company shall have the right to replace, at its own expense, such tracks with new tracks and appliances necessary for the proper operation of the cars of both companies over and upon said tracks. Before any such use occurs compensation shall be paid *to the corporation owning the track laid.* In case of disagreement, the Court of Common Pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view and assess the *damages and return thereof make to the court, with the right of appeal now secured under section eight of article sixteen of the Constitution and of an act for the further regulation of appeals from assessment of damages to owners of property taken for public use, passed June thirteen, one thousand eight hundred and seventy-four.* If such an appeal be taken, it shall be competent to pay into court the amount of such award, upon which payment the right to use said tracks shall vest, and said sum shall await the final judgment of said appeal," be and the same is hereby amended so as to read as follows:

Section 14. Any passenger railway company, incorporated under this act, shall have the right to use such portion of the single or double tracks of, *or the streets, highways and bridges occupied by,* any other passenger railway company or companies, incorporated under this *or any general or special act,* and already laid down *and in constant daily use,* and all of any *streets, highways and bridges included in the route of any other company or companies, when the tracks are not laid down or are not in constant daily use, or are only in temporary use, as it may require,* either to construct a circuit upon its road *or upon any of its branches or extensions, or to connect its road with any and all its branches and extensions or with the road of any other passenger railway company.* The length of tracks to be

used of any other road already laid down, shall be used only with the consent of the local authorities of the city, borough or township in which the same are laid, and in no event shall exceed two thousand five hundred feet in length of street or highway, in which measurement no bridge to be crossed, or the approaches thereto, shall be included; and shall have the further right to use all bridges and the approaches thereto, in use by any other company, in addition to the two thousand five hundred feet of track hereinbefore provided for; and said company shall have the right to replace, at its own expense, such tracks with new tracks and appliances necessary for the proper operation of the cars of both companies over and upon said tracks. Before any such use occurs, compensation shall be paid or secured to any person or corporation injured thereby. In case the parties cannot agree as to the amount of compensation to be paid, then the Court of Common Pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view and assess the compensation for the use of the tracks already laid and in constant daily use, or the streets, highways or bridges on which the same are laid, whether the said corporation owning said tracks shall or shall not have the exclusive right to lay tracks in said street or highway, either by virtue of their charter or any other legislation claiming to confer such exclusive privilege. The jury so appointed shall hear the testimony, and shall make a report to the court, assessing the damages which the corporation claiming the privilege of laying or using tracks shall pay for the said privilege; and if no appeal shall be taken to the said report, the court shall, at the expiration of thirty days, confirm the said report; and the amount so fixed by the jury shall then be due and payable: Provided, however, That either party shall have a right of appeal, within the said thirty days, from the award of the jury, as now provided by law. If the damages due are to be secured, such security shall be given, in such amount, as the court having jurisdiction thereof shall direct, and shall be approved by said court; whereupon, upon such security being entered, the company so entering the same shall have the right to the immediate use of such streets or tracks. If an appeal shall be taken, it shall be competent for the party against whom an award has been made to pay into court the

amount of such award, upon which payment the right to *lay or* use said tracks shall vest, and said sum shall await the final judgment on said appeal.

Section 4. That section fifteen of an act, entitled "An act to provide for the incorporation and government of street railway companies of this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, as amended by an act, entitled "An act to amend an act, entitled 'An act to provide for the incorporation and government of street railway companies in this Commonwealth,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, increasing the length of the tracks of other companies that may be used, authorizing the carrying and distribution of mails of the United States, and the abandonment of portions of street railways," approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five, which reads as follows:

"Section 15. No street passenger railway shall be constructed by any company, incorporated under this act, within the limits of any city, borough or township, without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder, which shall not have a continuous route from the beginning to the end, excepting the twenty-five hundred feet authorized to be used under section fourteen as amended by the provisions of this act," be and the same is hereby amended so as to read as follows:

Section 15. No street passenger railway shall be constructed by any company, incorporated under this act, within the limits of any city, borough or township, without the consent of the local authorities thereof; nor shall any street railway *be incorporated hereunder, which shall not have a continuous route, including branches and extensions, from the beginning to the end, including connections made with each of its branches and extensions or they with each other, and including the use of bridges and the approaches thereto,* and the two thousand five hundred feet authorized to be used under section fourteen as amended by the provisions of this act.

Section 5. That section four of the act, entitled "An act to amend an act, entitled 'An act to provide for the incorporation and government of street railways in this Commonwealth,' ap-

proved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, as amended by an act, entitled 'An act to amend an act, entitled 'An act to provide for the incorporation and government of street railway companies in this Commonwealth,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine,' increasing the length of the tracks of other companies that may be used, authorizing the carrying and distribution of mails of the United States, and the abandonment of portions of street railway companies, approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five, which reads as follows:

"Section 4. Any company incorporated under the provisions of an act, entitled 'An act to provide for the incorporation and government of street railway companies in this Commonwealth,' approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, is hereby authorized and empowered, with the consent of the authorities of the *municipality* within which said railway is located, to abandon any portion of its road, without prejudice to its right to operate, or to complete and operate, the remaining portion of its railway, by appropriate action by its board of directors, with the approval of a majority in value of its stockholders, upon the filing of a copy of such action, certified under the hand of its president and secretary, and the seal of the company, in the office of the Secretary of the Commonwealth, and also with the proper *municipal* authorities," be and the same is hereby amended so as to read as follows:

Section 4. Any company incorporated under the provisions of an act entitled, "An act to provide for the incorporation and government of street railways in this Commonwealth," approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, is hereby authorized and empowered, with the consent of the *local* authorities of *any city, borough or township* within which said railway is located, to abandon any portion of its road, without prejudice to its right to operate, or to complete and operate, the remaining portion of its railway, by appropriate action by its board of directors, with the approval of a majority in value of its stockholders, upon the filing of a copy of such action, certified under the

hands of its president and secretary and the seal of the company, in the office of the Secretary of the Commonwealth, and also with the proper local authorities. *All streets, highways and bridges, or parts thereof, the use and occupation of which is thus abandoned, or which shall be deemed abandoned as hereafter set forth, and any other street, highway or bridge, or part or parts thereof, the use and occupation of which has heretofore been abandoned or discontinued, or which is only in temporary use, or which is not occupied by any railway because of the prohibition contained in any act of Assembly or any ordinance of councils, or because of any contract or agreement by and between any railway and the Commonwealth of Pennsylvania, or any railway and the local authorities of any city, borough or township, or the Commonwealth and any of the citizens thereof, or because of any ordinance of the councils of any city, borough or township, may thereafter or hereafter, with the consent of the local authorities of such city, borough or township, but not otherwise be occupied and used by any railway company chartered under this act, or by the company which has abandoned or discontinued the use thereof. Before such use shall be made of any such street, highway or bridge, compensation for the use thereof shall be made or secured to any persons or corporations having vested rights under any such act of Assembly, ordinance, contract or agreement, and injured thereby. Such compensation shall be made or secured, in the manner herein provided for by the amendment to the fourteenth section of an act, entitled "An act to provide for the incorporation and government of street railway companies of this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine.*

Section 6. Any company which does not, within two years from the date of its incorporation, make formal application to the local authorities of the proper city, borough or township for leave to occupy and use the streets, highways or bridges which, by its charter, it is authorized to occupy and use, and any company which heretofore has or hereafter does obtain legislative or municipal consent to occupy and use the same, and does not begin work within two years after such consent shall be obtained, and complete its road, as provided by its charter, within five years thereafter, and constantly daily use the same there-

after for the transportation of passengers, shall be deemed to have abandoned the right to occupy and use such streets, highways and bridges; and the same may be occupied and used by any other company, duly chartered and obtaining consent so to do, anything in any general or special act of Assembly or municipal ordinance to the contrary, notwithstanding.

Section 7. Any railway company, incorporated under this act, shall have the right and power, if it deem it to be necessary in order to make connections with any portion of its track, whether main line, branches or extensions, to acquire property, either by purchase or otherwise; and after acquiring such property, shall have the right to lay its track upon the same as if it were a public highway, and to connect the track, so laid upon the property so acquired, with any other portions of its track laid upon public highways adjacent thereto.

Section 8. No street passenger railway company heretofore or hereafter incorporated under the act hereby amended, shall be authorized or permitted to connect its tracks with the tracks of any railroad company, incorporated under any law of this State for the transportation of both passengers and freight, nor shall the interchange of cars and continuous movement thereof between and over the tracks of such street passenger railway company and such railroad company be authorized or permitted.

Section 9. All acts of Assembly and parts of acts inconsistent herewith, including all local and special laws. be and the same are hereby repealed.

Approved—June 7, 1901. P. L. 514.

AN ACT to provide for the incorporation and government of passenger railways, either elevated or underground, or partly elevated and partly underground, with surface rights.

Section 1. That any number of persons not less than five, three of whom shall be citizens of this Commonwealth, may form a company for the purpose of construction and operation of passenger railways, either elevated or underground, or partly elevated and partly underground for the transportation of passengers and with power and authority to contract for and to locally gather, carry and distribute the mails of the United States, and with power to construct such

portion thereof upon the surface as may be reasonably necessary for terminals or connections between the underground and elevated sections thereof: Provided, however, That the surface so occupied shall not exceed two thousand five hundred feet in length, in any one place which said railways may be constructed and operated upon, over, under, across, through, and along any street, highway or bridge in this Commonwealth, upon which no railway incorporated under this act is already erected or constructed, and in constant daily use for the transportation of passengers, or authorized to be erected or constructed under any existing charter issued under this act, and for which permission to erect or construct the same has been obtained from the local authorities of the city, borough or township in which the same is to operate, within two years, with the privilege of occupying so much of the said streets, highways or bridges mentioned in their charter as may be necessary for the erection and operation of said railway for public use, in the conveyance of passengers, by such motive power, other than steam, as may be adopted from time to time; and said companies may build and operate on, over, under, across, through, and along streets, highways and bridges on which passenger railways are constructed or authorized to be constructed on the surface of the street and may use and occupy the surface to the extent of two thousand five hundred feet, as herein provided.

Section 2. The charter of such intended corporation shall be subscribed by at least three of the incorporators; who shall certify, in writing, to the Governor, the name of the company; the number of years the same is to continue; the length of road, as near as may be, and the route and character of construction; the amount of capital stock of the company, which shall not be less than fifty thousand dollars for every mile of road proposed to be constructed, and the number of shares and the par value of each; the names and places of residences of the president and board of directors, who shall manage its affairs until the first annual meeting thereafter, and until others are chosen in their places. Each subscriber shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the preceding provisions of this section, the articles of

association shall be acknowledged by at least three of the directors, before some officer competent to take acknowledgment of deeds, and may be filed in the office of the Secretary of the Commonwealth, who shall endorse thereon the day on which they were filed, and record the same in a book to be provided by him for such purpose. Thereupon the Governor shall issue his letters patent, creating the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, a corporation, by the name specified therein, which shall possess the powers and privileges following, namely:

First. To have succession, by its corporate name, for the period limited in its articles of association.

Second. To sue and be sued, complain and defend, in any court of law or equity.

Third. To make and use a common seal, and alter the same at pleasure.

Fourth. To take, hold, purchase, operate, lease, and convey such real and personal property, estate and franchises as the purposes of the corporation shall require.

Fifth. To appoint such officers and agents as the business of the corporation shall require.

Sixth. To make by-laws, not inconsistent with the Constitution or any existing law, for the government of its property and regulation of its affairs, and for the transfer of its stock.

Seventh. To sell or lease its road and franchises, or parts thereof, to traction or motor power companies or to other passenger railway companies, or to acquire the roads, property and franchises of other passenger railway companies, by lease or purchase. But no company incorporated under this act shall be authorized or permitted to connect its tracks with the tracks of any railroad company, incorporated under any law of this State for the transportation of both passengers and freight, nor shall the interchange of cars and continuous movement thereof between and over the tracks of any railway company incorporated under this act and such railroad company be authorized or permitted.

Section 3. Such articles of association shall not be filed and recorded in the office of the Secretary of the Commonwealth until at least twenty-five thousand dollars of stock for every

mile of road proposed to be constructed shall have been subscribed thereto, and ten per centum paid thereon in good faith and in cash to the directors named in said articles of association; nor until there is endorsed thereon or annexed thereto an affidavit, made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and ten per centum paid in cash thereon, as aforesaid, and that it is intended in good faith to construct and to maintain and operate the road mentioned in said articles of association, which affidavit shall be recorded with the articles of association, as aforesaid.

Section 4. Unpaid subscriptions to the capital stock of such corporations shall be payable at such times and places and in such proportions and installments as the directors shall require, of which public notice shall be given, for at least two weeks preceding the time appointed for the purpose, in one or more newspapers published in the county; and if any subscriber shall neglect to pay such installment, so called for, at the time and place appointed, he, she or they shall be liable to pay, in addition to said installment a penalty, at the rate of one per centum per month for the delay; and if the same and the additional penalty, or any part thereof, shall remain unpaid for the period of six months, he, she, or they shall, at the discretion of the directors, forfeit, for use of the company, all right, title and interest in and to every and all stock, on account of which such default in payment may be made, as aforesaid; or, the directors may bring suit to recover the amount due, together with the penalty. In the event of forfeiture, the share or shares so forfeited may be disposed of at the discretion of the president and directors, under such rules and regulations as may be prescribed by the by-laws; but no forfeiture of stock shall release the owner from any liabilities or penalties incurred prior to the forfeiture. When stock shall have been paid in full, the board of directors shall cause certificates for the same to be issued to the parties entitled thereto, signed by the president and countersigned by the treasurer, and sealed with the corporate seal; which certificates shall be transferable at the pleasure of the holder on the books of the company, in person, or by attorney duly authorized, and the assignee shall thereupon be a member of such corporation. Companies incorporated under this act

may issue either preferred or common stock, or both, as may be considered advisable.

Section 5. Whenever any company incorporated under this act shall, in the opinion of the directors thereof, require an increased amount of capital stock, in order to complete and equip its road and carry out the full intent and meaning of its articles of association, it shall, if authorized by a majority of the stockholders voting at a meeting called for that purpose, which call shall be in the manner provided by the Constitution and laws of this State, file with the Secretary of the Commonwealth, a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have such increased capital as is fixed by said certificate.

Section 6. The president and directors of any company created under this act shall have power to borrow money, not exceeding the amount of the capital stock authorized to be issued, and issue the bonds or obligations of the company therefor, in such amounts and on and upon such terms, and at such times as the directors shall deem best, the proceeds whereof shall be expended in the construction and equipment of their railways; these bonds or obligations to be payable at such times, and at such place, and at such rate of interest, as said directors may deem best, and may secure the payment of said bonds or obligations and interest by a mortgage or mortgages on the said railways and franchises.

Section 7. The stockholders of such corporations shall hold annual meetings for the purpose of electing a president and board of directors, upon such date as may be fixed by the by-laws, and special meetings may also be called as prescribed by said by-laws. At all elections, each stockholder shall be entitled to one vote for each share of stock held in the company; but no share of stock sold within sixty days of the said election shall entitle the holder thereof to vote on the same; nor shall any proxy be received, or entitle the holder to vote, which shall have been executed more than three months preceding such election; and no stockholder shall be entitled to vote any shares, at any election, in case any arrearages of any assessment shall be due on such share or shares for more than thirty days prior to such election.

Section 8. Corporations created under this act shall, for the

purpose of constructing the railways herein authorized, and the necessary stations and approaches thereto as herein provided, have the right of eminent domain, which is hereby expressly conferred, and may construct, maintain, and operate their railways, stations and approaches thereto, on, under, over, across, through and along any street, highway or bridge, or on, over, under, across, through and along lands and tenements in private ownership; and may locate, fix and determine such route for the railways as the board of directors may deem expedient, on, under, over, across, through and along any street, highway, bridge or private property, not, however, passing through any burying-grounds or place of worship; and thereon may erect, construct, establish and operate a railway, with such stations and approaches as they may deem necessary; and, in like manner, by themselves or other persons by them appointed, may enter upon and into, and occupy, take and acquire, all land and buildings which may be necessary for the said railways, stations or approaches, or other needful buildings, or appurtenances, or convenient for the construction and maintenance of the same. Such corporations, however, shall in all cases make just compensation for all property taken, injured or destroyed by the construction or enlargement of their railway. If the parties claiming compensation and the said corporation, so chartered under this act, shall not be able to agree as to the amount of compensation to be paid by reason of the construction, maintenance or operation of said road, then the Court of Common Pleas of the proper county, upon petition of any person in interest, shall appoint five persons to view and assess the compensation due to all persons, corporations or bodies politic that have failed to agree with the corporation so chartered, by reason of the construction, maintenance and operation of the said road and its branches, or of its stations and approaches thereto, and make report thereof to the court. Any party dissatisfied with the report shall have the right to appeal to the Court of Common Pleas in which the said report shall have been filed, and thereupon the amount of compensation shall be determined by a jury, on issues properly framed, according to the course of the common law, subject to such rules and regulations as the said court may prescribe. Where any such corporation desires to proceed with the construction or operation of its rail-

way before the compensation shall be determined and paid, it may do so, provided it shall first give a bond to the Commonwealth of Pennsylvania, for the use of all parties interested, in such amount and with such sureties as the Court of Common Pleas, of the proper county, having jurisdiction of the matter, may direct.

Section 9. Every company organized under this act shall maintain an office within this State for the transaction of its business, where transfers of its stock shall be made, and books kept for inspection by its stockholders or bondholders.

Section 10. Every company incorporated under this act shall have authority to use so much of the streets, highways and bridges of this Commonwealth, immediately adjacent to their tracks, as may be necessary and proper, either for the erection of stations or the proper, necessary and convenient approaches thereto, or both; but in the case of elevated roads, all stations must be on a level with the tracks; all of which, however, shall be erected and maintained and operated subject to all rules and regulations which may be made or passed by the local authorities of any city, borough or township, through which the said road may run, in regard to the same.

Section 11. Corporations incorporated under this act may construct branches and extensions, but in that case shall first file in the office of the Secretary of the Commonwealth a resolution of the board of directors, approved by the stockholders, giving the route of such branches and extensions.

Section 12. Any company proposing to construct a railway or any branch or extension thereof, under the provisions of this act, shall in good faith commence the construction thereof within two years after the consent of the proper local authorities of the city, borough or township, within which the same is located, shall have been obtained; and the same shall be completed within five years thereafter, unless the time shall be extended by the authority aforesaid. Whenever a charter shall be granted to any corporation to build a road as provided by this act, no other charter to build a road on, over, under, across, through or along the same streets, highways, bridges or property shall be granted to any other company, within the time during which, by the provisions of this act, the company first securing the charter has the right to commence and complete

its work: Provided, That the consent of the local authorities shall be promptly applied for, and shall have been obtained within two years from the date of the charter.

Section 13. Any corporation chartered under this act shall have the right, from time to time, to increase its capital stock, and to issue and sell stock and bonds or other obligations, to such an amount and upon such terms, as shall be deemed proper to enable them to perform the duties of their organization.

Section 14. Any company incorporated under this act shall have power, by its officers and servants, to construct and operate its road as authorized by this act on, over, under, across, through, and along any turnpike or turnpikes, and to use the same for its general business; and, in addition to the space so occupied by its tracks, may occupy so much of the space on, over, under, across, through, and along such turnpikes as may be necessary for the erection of the proper stations and approaches thereto: Provided, however, That it shall make or secure compensation to the owner or owners of such turnpike for such occupation and use, in the mode provided for in section eight hereof.

Section 15. If in the construction of any railway, incorporated under this act, it shall become necessary to cross any river or rivers, creeks or water courses within this State, the said company shall have power and authority to bridge or tunnel the same. The route and method of construction, or both, as described in the charter of any company incorporated under this act, may be changed, with the consent of the local authorities of the proper city, borough or township; but, in that case, if the company shall accept such change, a resolution of the board of directors, setting out the change and the authority therefor, shall be filed in the office of the Secretary of the Commonwealth. Such change shall only be made when ratified and approved by a majority of the stockholders, voting at a meeting called for the purpose of considering such change.

Approved—June 7, 1901. P. L. 523.

A SUPPLEMENT to an act entitled "An act to provide for the incorporation and government of passenger railways, either elevated or under ground, or partly elevated and partly under ground, with surface rights," approved June seventh, one thousand nine hundred and one, authorizing

the building of either an elevated or underground railway, or both an elevated and underground railway, having first obtained consent of local authorities.

Section 1. That any company chartered to build either an elevated or an underground railway under the provisions of the act entitled "An act to provide for the incorporation and government of passenger railways, either elevated or underground, or partly elevated and partly underground, with surface rights," approved June seventh, one thousand nine hundred and one, shall have power and is hereby authorized to build either an elevated or an underground railway, or both an elevated and an underground railway, over the route described in their charter, having first obtained the consent of the local authorities of the city, borough or township through which the said railway is located.

Approved—June 19, 1901. P. L. 572.

AN ACT to amend an act, entitled "An act to provide for the incorporation and government of passenger railways, either elevated or underground, or partly elevated and partly underground, with surface rights," approved the seventh day of June, Anno Domini one thousand nine hundred and one, providing for the abandonment by corporations incorporated under said act of portions of their road, and permitting them to use parts of the tracks of other companies incorporated under said act, with the consent of such company; and further providing for the merger of companies incorporated under said act.

Section 11. Corporations incorporated under this act may construct branches and extensions, but in that case shall first file in the office of the Secretary of the Commonwealth a resolution of the board of directors, approved by the stockholders, giving the route of such branches and extensions; *and every company incorporated under the provisions of this act is hereby authorized and empowered, with the consent of the local authorities of any city, borough, or township within which said railway is located, to abandon any portion of its road, without prejudice to its right to operate or complete and operate the remaining portion of its railway, by appropriate action of its board of directors, with the approval of a majority of its stockholders present at a meeting to be specially called for that purpose, after thirty days notice, and upon filing a copy of such*

action, duly certified by the president and secretary, under the seal of the company, in the office of the Secretary of the Commonwealth, and also with the proper local authorities. Every company incorporated under this act shall have the right to use any part or all of the tracks or railway of any other company incorporated under this act, with the consent of such other company, to be expressed by a resolution of its board of directors, ratified by a vote of a majority in value of the stockholders of such other company, and such use may be exclusive or in conjunction with such other company, as the said companies shall agree; and companies incorporated under this act shall have the right to merge their several rights, privileges and franchises with other companies, so incorporated, whenever in the opinion of the directors and stockholders of such companies it shall be for their mutual interest; but such merger shall not take place until a resolution to that effect shall have been adopted by the boards of directors of the respective companies desiring to so merge, and such action shall have been approved by a majority in value of the stockholders of such company. Whenever two or more roads shall be so merged, the commencement of work, in good faith, upon any part of the route of any of such merged roads shall be held to be a commencement upon all the merged lines or roads, within the meaning of this act, and a compliance with the provisions hereof, as to the time within which work must be commenced: Provided, however, that the work shall be completed within five years upon all the said merged roads, unless the time for such completion shall be extended by the proper local authorities of the city, borough, or township within which the said roads are located.

Approved—March 25, 1903. P. L. 52. Amending Act of June 7, 1901.

AN ACT to empower the Commissioner of Forestry and the Forestry Reservation Commission to give street railway companies the privilege to construct, maintain and operate their lines of railway over, along and upon public highways within or bordering on forest reservations owned by the Commonwealth.

Section 1. That the Commissioner of Forestry and the Forestry Reservation Commission are hereby authorized and empowered to give to street railway companies duly

incorporated under the laws of this Commonwealth, upon such terms and subject to such restrictions and regulations as said commissioner and Commission may deem proper, the privilege to construct, maintain and operate their lines of railway over, along and upon public highways, now laid out and in actual use, which lie within or border on any forest reservations now owned or hereafter to be acquired by the Commonwealth, whenever in the judgment of the said Commissioner and Commission the interests of the Commonwealth in the said reservations shall be benefitted thereby.

Approved—April 15, 1903. P. L. 200.

AN Act amending the third section of a supplement to an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-nine, one thousand eight hundred and seventy-four, "providing for the improvement, amendment and alteration of the charters of corporations of the second class, and authorizing the incorporation of traction motor companies," approved the thirteenth day of June, Anno Domini one thousand eight hundred and eighty-three; requiring corporations to file a certificate with the Governor of the Commonwealth, setting forth that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth have been paid, before the improvement, amendment or alteration of the charter of any corporation.

Section 1. That section three of a supplement to an act "providing for the improvement, amendment and alteration of the charters of corporations of the second class, and authorizing the incorporation of traction motor companies," approved the thirteenth day of June, one thousand eight hundred and eighty-three, which reads as follows:

"Section 3. The said corporation shall prepare a certificate, under its corporate seal, setting forth the character and objects of the proposed improvement, amendment or alteration of their charter, or the instrument upon which the said corporation is formed or established, acknowledged by the president and secretary of said corporation before the Recorder of Deeds of the county wherein such corporation has its principal office or place of business, which certificate, together with proof of publication of notice as *hereinbefore* provided, shall then be produced to the Governor of the Commonwealth, who shall examine the same, and if he find it to be in the proper form, and as such

improvements, amendments or alterations are or will be lawful and beneficial and not injurious, to the community, and are in accord with the purposes of the charter, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue in the usual form, reciting the said improvements, amendments or alterations, and the said certificate shall then be recorded in the office of the Secretary of the Commonwealth, and with all its endorsements shall then be recorded in the office for the Recording of Deeds in and for the proper county where the principal office or place of business of said corporation is located, and from thenceforth the same shall be deemed and taken to be a part of the charter or instrument upon which said corporation is formed or established, to all intents and purposes, as if the same has originally been made a part thereof: Provided, That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water companies so as to interfere with or cover territory previously occupied by any other gas or water company," be and the same is hereby altered and amended so as to read as follows:

Section 3. The said corporation shall prepare a certificate, under its corporate seal, setting forth the character and objects of the proposed improvement, amendment or alteration of their charter, or the instrument upon which the said corporation is formed or established; *also, that all reports required by the Auditor General of the Commonwealth have been filed, and that all taxes due the Commonwealth of Pennsylvania have been paid;* acknowledged by the president and secretary of said corporation and before the Recorder of Deeds of the county wherein such corporation has its principal office or place of business; which certificate, together with proof of publication of notice, as provided *in section two of the supplement to an act of which this is an amendment*, shall then be produced to the Governor of the Commonwealth, who shall examine the same, and, if he find it to be in proper form, and that such improvements, amendments or alterations are or will be lawful and beneficial, and not injurious, to the community, and are in accord with the purpose of the charter, *and that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth of Penn-*

sylvania have been paid, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue, in the usual form, reciting the said improvements, amendments or alterations; and the said certificate shall then be recorded in the office of the Secretary of the Commonwealth, and, with all its endorsements, shall then be recorded in the office for the Recording of Deeds in and for the proper county, where the principal office or place of business of said corporation is located; and from thenceforth the same shall be deemed and taken to be a part of the charter or instrument upon which said corporation was formed or established, to all intents and purposes, as if the same had originally been made a part thereof: Provided, That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company, so as to interfere with or cover territory previously occupied by any other gas or water company.

Section 2. All acts and parts of acts inconsistent herewith be and the same are hereby repealed.

Approved—March 31, 1905. P. L. 93.

A SUPPLEMENT to an act entitled "An act to further amend an act, entitled 'An act to provide for the incorporation and government of street railway companies in this Commonwealth,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, and the amendments thereto, approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five; and providing for the length of tracks of any companies that may be used by another company; for the use by any company of streets, highways and bridges which have been abandoned or may be abandoned, or are not in use by any other companies chartered or authorized to use the same, or which are not in constant daily use for the transportation of passengers by such companies; and for the use of streets, highways and bridges by any company, which other companies have relinquished the right to use, or which are only in temporary use, either by virtue of the provisions of any act of Assembly, or of any ordinance of council, or of any contract or agreement with the Commonwealth or the local authorities of any city, borough or township; and providing compensation therefor; limiting the time within which application must be made to the local authorities of any city, borough or township, within which work must be commenced and the railway completed; and providing that where a company shall receive a charter to build a road on any street or highway, no other charter shall be granted to any other company to occupy the same street or highway, until after the time given to the

first company to obtain the consent of the local authorities, and begin and complete its work, shall have elapsed; conferring the right to acquire property by purchase, for certain uses of the corporation," approved the seventh day of June, Anno Domini one thousand nine hundred and one.

Section 1. That section one of an act, entitled "An act to further amend an act, entitled 'An act to further amend an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, and the amendments thereto, approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five; and providing for the length of tracks of any companies that may be used by another company; for the use by any company of streets, highways and bridges which have been abandoned or may be abandoned, or are not in use by any other companies chartered or authorized to use the same, or which are not in constant daily use for the transportation of passengers by such companies; and for the use of streets, highways and bridges by any company, which other companies have relinquished the right to use, or which are only in temporary use either by virtue of the provisions of any act of Assembly or of any ordinance of council or of any contract or agreement with the Commonwealth or the local authorities of any city, borough or township; and providing compensation therefor; limiting the time within which application must be made to the local authorities of any city, borough or township, within which work must be commenced and the railway completed; and providing that where a company shall receive a charter to build a road on any street or highway, no other charter shall be granted to any other company to occupy the same street or highway, until after the time given to the first company to obtain the consent of the local authorities, and begin and complete its work, shall have elapsed; conferring the right to acquire property by purchase, for certain uses of the corporation," approved the seventh day of June, Anno Domini one thousand nine hundred and one, which amended section one of the said act of May fourteenth, one thousand eight hundred and eighty-nine, so that it reads as follows:

"Section 1. That any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway for public use in the conveyance of passengers, by any power other than locomotive, on any street or highway upon which no track is laid, under any existing charter, *and in constant daily use for the transportation of passengers at the time of the application by another company for a charter to use such street*, with the privilege of occupying so much of any other street, highway or bridge as is hereinafter provided; *but whenever a charter, after the approval of this act, shall be granted to any corporation to build a road as provided by this act, no other charter to build a road on the same streets, highways, bridges or property shall be granted to any other company within the time during which, by the provisions of this act, the company first securing the charter has the right to commence and complete this work: Provided, That the consent of the local authorities shall be promptly applied for, and shall have been obtained within two years from the date of the charter*; for the purpose of such formation said persons may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the length of such road, as near as may be, the streets, highways and bridges upon which the said railway is to be laid and constructed, showing also the circuit of the route, the amount of the capital stock of the company, which shall not be less than six thousand dollars to every mile of road proposed to be constructed, and the number of shares of which said capital stock is to consist, and the names and places of residence of a president and not less than four nor more than twelve directors of the company, who shall manage its affairs until the first annual meeting thereafter and until others are chosen in their places; each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the second section of this act, such articles of association shall be acknowledged by at least three of the directors, before some officer competent to take acknowledgments of deeds, and may be filed in the office of the Secretary of the Commonwealth,

who shall endorse thereon the day on which they were filed, and record the same in a book to be provided by him for that purpose; whereupon the Governor shall issue his letters patent, creating the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, a corporation by the name specified therein, and shall possess the powers and privileges following, namely:

First. To have succession by its corporate name for the period limited in its articles of association.

Second. To sue and be sued, complain and defend, in any court of law or equity.

Third. To make and use a common seal, and alter the same at pleasure.

Fourth. To take, hold, purchase, operate, lease, and convey such real and personal property, estate and franchises, as the purposes of the corporation shall require.

Fifth. To appoint such officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

Sixth. To make by-laws not inconsistent with the constitution or any existing laws, for the management of its property and regulation of its affairs, and for the transfer of its stock.

Seventh. To sell or lease their road and franchises, or parts thereof, to traction or motor power companies, or to other passenger railway companies, or to acquire the roads, property and franchises of other passenger railway companies by lease or purchase," be and the same is hereby amended so as to read as follows:

Section 1. That any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway for public use in the conveyance of passengers, by any power other than locomotives, on any street or highway, *now laid out or to be laid out, and upon which no track is laid or authorized to be laid*, under any existing charter, with the privilege of occupying so much of any street, highway or bridge, *so occupied or authorized to be occupied*, as is hereinafter provided. For the purpose of such formation said persons may make and sign articles of association, in which shall be stated the name of the company, the number of years the said company is to continue;

the length of such road, as near as may be; the streets, highways, and bridges upon which the said railway is to be laid and constructed; showing also the circuit of the route, the amount of the capital stock of the company, which shall not be less than six thousand dollars to every mile of road proposed to be constructed, and the number of shares of which said capital stock is to consist, and the names and places of residence of a president and not less than four nor more than twelve directors of the company, who shall manage its affairs until the first annual meeting thereafter and until others are chosen in their places; each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the second section of this act, such articles of association shall be acknowledged by at least three of the directors, before some officer competent to take acknowledgments of deeds, and may be filed in the office of the Secretary of the Commonwealth, who shall endorse thereon the day on which they were filed, and record the same in a book to be provided by him for that purpose; whereupon the Governor shall issue his letters patent, creating the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, a corporation by the name specified therein, and shall possess the powers and privileges following, namely:

First. To have succession by its corporate name for the period limited in its articles of association.

Second. To sue and be sued, complain and defend, in any court of law or equity.

Third. To make and use a common seal, and alter the same at pleasure.

Fourth. To take, hold, purchase, operate, lease, and convey such real and personal property, estate and franchises, as the purposes of the corporation shall require.

Fifth. To appoint such officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

Sixth. To make by-laws, not inconsistent with the constitution or any existing laws, for the management of its property and regulation of its affairs, and for the transfer of its stock.

Seventh. To sell or lease their road and franchises, or parts thereof, to traction or motor power companies, or to other passenger railway companies, or to acquire the roads, property and franchises of other passenger railway companies by lease or purchase. *Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the county or counties within which the route of the proposed company lies, once a week for three weeks, setting forth the character and route of the corporation to be formed, and the intention to make application therefor.*

Section 2. That section four of said act of May fourteenth, one thousand eight hundred and eighty-nine, which, as amended by said act of June seven, one thousand nine hundred and one, reads as follows:

"Section 4. Any company incorporated under this act shall have authority to construct such extensions or branches as it may deem necessary to increase its business and accommodate the travel of the public: Provided, That the act of the company authorizing any extensions or branches shall name the streets, highways and bridges on which each extension or branch is to be laid and constructed, and a copy of the minutes of said company, containing said authority, shall be recorded in the office of the Recorder of Deeds for the proper county, and an exemplification of the said record shall be filed in the office of the Secretary of the Commonwealth; and no right to actually construct the same shall vest until after thirty days from the filing of said exemplification: And provided, That no extension or branch shall be constructed on any street or highway upon which a track is laid, and in constant daily use for the transportation of passengers, under any existing charter, at the time of the filing of such exemplification, except as hereinafter provided," be and the same is hereby amended so as to read as follows:

Section 4. Any company incorporated under this act, *desiring authority to construct any branch or extension, shall file in the office of the Secretary of the Commonwealth a duly certified copy of a resolution of its stockholders, setting forth in detail the route of the proposed branch or extension, which paper shall be forthwith presented to the Governor for his approval; and if the Governor shall be of opinion that said proposed*

branch or extension is within the general scope of the original charter, and does not conflict with any rights previously granted and in existence, he shall approve the same; whereupon the Secretary of the Commonwealth shall issue a certificate that said branch or extension has been duly authorized, and, upon the same having been duly recorded in the county or counties within which such extension lies, said company shall be vested with the right to construct and operate the same, provided it receives consent from the proper local authorities.

Section 3. That section fourteen of the said act of May fourteenth, eighteen hundred and eighty-nine, which, as amended by the said act of June seventh, nineteen hundred and one, reads as follows:

"Section 14. Any passenger railway company incorporated under this act shall have the right to use such portion of the single or double tracks of, or the streets, highways or bridges occupied by, any other passenger railway company or companies, incorporated under this or any general or special act, and already laid down and in constant daily use, and all of any streets, highways and bridges included in the route of any other company or companies, when the tracks are not laid down or are not in constant daily use, or are only in temporary use, as it may require either to construct a circuit upon its road or upon any of its branches or extensions, or to connect its road with any and all of its branches and extensions or with the road of any other passenger railway company. The length of tracks to be used of any other road already laid down, shall be used only with the consent of the local authorities of the city, borough or township in which the same are laid, and in no event shall they exceed two thousand five hundred feet in length of street or highway, in which measurement no bridge to be crossed, or the approaches thereto, shall be included; and shall have the further right to use all bridges and the approaches thereto, in use by any other company, in addition to the two thousand five hundred feet of track hereinbefore provided for; and said company shall have the right to replace, at its own expense, such tracks with new tracks and appliances, necessary for the proper operation of the cars of both companies over and upon said tracks. Before any such use occurs, compensation shall be paid or secured to any person or corporation injured

thereby. In case the parties cannot agree as to the amount of compensation to be paid, then the Court of Common Pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view and assess the compensation for the use of the tracks already laid and in constant daily use, or the streets, highways or bridges on which the same are laid, whether the said corporation owning said tracks shall or shall not have the exclusive right to lay tracks in said street or highway, either by virtue of their charter or any other legislation claiming to confer such exclusive privilege. The jury so appointed shall hear the testimony, and shall make a report to the court, assessing the damages which the corporation claiming the privilege of laying or using tracks shall pay for the said privilege; and if no appeal shall be taken to the said report, the court shall, at the expiration of thirty days, confirm the said report; and the amount so fixed by the jury shall then be due and payable: Provided, however, That either party shall have a right of appeal, within the said thirty days, from the award of the jury, as now provided by law. If the damages due are to be secured, such security shall be given, in such amount as the court having jurisdiction thereof shall direct, and shall be approved by said court; whereupon, upon such security being entered, the company so entering the same shall have the right to the immediate use of such streets or tracks. If an appeal shall be taken, it shall be competent for the party against whom an award has been made to pay into court the amount of such award, upon which payment the right to lay or use said tracks shall vest, and said sum shall await the final judgment on said appeal," be and the same is hereby amended so as to read as follows:

Section 14. Any passenger railway company, incorporated under this act, shall have the right to use such portion of the single or double tracks of any other passenger railway company or companies, incorporated under this or any general or special act, as it may require, either to complete a circuit upon its road or upon any of its branches or extensions, or to connect its road with any and all its branches and extensions, or with the road of any other passenger railway company: Provided, That there shall be filed with the application for a charter, or for authority to construct any branch or extension, a cer-

tified copy of a resolution of the board of directors of the company, whose tracks are to be so used, signifying its consent to such use.

Section 4. That section fifteen of the said act of May fourteenth, eighteen hundred and eighty-nine, which as finally amended by the said act of June seventh, nineteen hundred and one, reads as follows:

"Section 15. No street passenger railway shall be constructed by any company, incorporated under this act, within the limits of any city, borough, or township, without the consent of the local authorities thereof; nor shall any street railway be incorporated hereunder which shall not have a continuous route, *including branches and extensions*, from the beginning to the end, including connections made with each of its branches and extensions, or they with each other, and including the use of *bridges and the approaches thereto*, and the two thousand five hundred feet authorized to be used under section fourteen as amended by the provisions of this act," be and the same is hereby amended so as to read as follows:

Section 15. No street passenger railway shall be constructed by any company, incorporated under this act, within the limits of any city, borough, or township, without the consent of the local authorities thereof; nor shall any street *passenger* railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, including connections made with each of its branches and extensions, or they with each other, *and including the use of the track of other companies, with the consent thereof, as authorized under section fourteen as herein amended.*

Section 5. That section four of the act, entitled "An act to amend an act, entitled 'An act to provide for the incorporation and government of street railways in this Commonwealth,' approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, as amended by an act, entitled 'An act to amend an act, entitled "An act to provide for the incorporation and government of street railway companies in this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine,' increasing the length of the tracks of other companies that may

be used, authorizing the carrying and distribution of mails of the United States, and the abandonment of portions of street railway companies," approved the twenty-first day of May, Anno Domini one thousand eight hundred and ninety-five, which, as amended by the said act of June seventh, one thousand nine hundred and one, which reads as follows :

"Section 4. Any company incorporated under the provisions of an act, entitled 'An act to provide for the incorporation and government of street railways in this Commonwealth,' approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, is hereby authorized and empowered, *with the consent of the local authorities of any city, borough, or township within which said railway is located, to abandon any portion of its road, without prejudice to its right to operate, or to complete and operate, the remaining portion of its railway, by appropriate action by its board of directors, with the approval of a majority in value of its stockholders, upon the filing of a copy of such action, certified under the hands of its president and secretary and the seal of the company, in the office of the Secretary of the Commonwealth, and also with the proper local authorities. All streets, highways or bridges, or parts thereof, the use and occupation of which is thus abandoned, or which shall be deemed abandoned as hereinafter set forth, and any other street, highway or bridge, or part or parts thereof, the use and occupation of which has heretofore been abandoned or discontinued, or which is only in temporary use, or which is not occupied by any railway, because of the prohibition contained in any act of Assembly, or any ordinance of councils, or because of any contract or agreement by and between any railway and the Commonwealth of Pennsylvania, or any railway and the local authorities of any city, borough or township, or the Commonwealth and any of the citizens thereof, or because of any ordinance of the councils of any city, borough or township, may thereafter or hereafter, with the consent of the local authorities of such city, borough or township, but not otherwise, be occupied and used by any railway company chartered under this act, or by the company which has abandoned or discontinued the use thereof. Before such use shall be made of any such street, highway or bridge, compensation for the use thereof shall be made, or secured, to any*

persons or corporations having vested rights under any such act of Assembly, ordinance, contract or agreement, and injured thereby. Such compensation shall be made or secured, in the manner herein provided for by the amendment to the fourteenth section of an act, entitled "An act to provide for the incorporation and government of street railway companies of this Commonwealth," approved the fourteenth day of May, Anno Domini one thousand eight hundred and eighty-nine, be and the same is hereby amended so as to read as follows:

Section 4. Any company incorporated under the provisions of an act, entitled "An act to provide for the incorporation and government of street railways in this Commonwealth," approved May fourteenth, Anno Domini one thousand eight hundred and eighty-nine, is hereby authorized and empowered, by contract with the local authorities, but not otherwise, to temporarily abandon, or to postpone the exercise of its franchise over the whole or a portion of its route, under such terms and conditions as may be agreed upon between such company and the said local authorities, a duplicate of which contract shall be filed in the office of the Secretary of the Commonwealth: Provided, however, That nothing in this section contained, nor any contract made in pursuance thereof, shall be construed to limit or affect in any way, or impose any additional liability for the exercise of the right of a steam railroad company to lay its tracks over, upon, under and across such street or streets, or portions thereof; and in case any company, not having received consent to so temporarily abandon or postpone the exercise of its franchise over the whole or a portion of its route, fails to complete its whole route during the time limited by the local authorities, it shall be deemed to have permanently abandoned the portion not so completed; but the said company shall have authority to maintain and operate the portion so completed, provided it constitutes, either by itself or with portions of the tracks of other companies which it may be authorized to use, a complete circuit for its cars.

Section 6. That section six of the said act of June seventh, one thousand nine hundred and one, which reads as follows:

"Section 6. Any company which does not, within two years from the date of its incorporation, make formal application to the local authorities of the proper city, borough, or township

for leave to occupy and use the streets, highways or bridges which by its charter it is authorized to occupy and use, and any company which heretofore has or hereafter does obtain legislative or municipal consent to occupy and use any streets, highways, or bridges, and does not forthwith diligently proceed to occupy and use the same, and does not begin work within two years after such consent shall be obtained, and complete its road as provided by its charter, within five years thereafter, and constantly daily use the same thereafter for the transportation of passengers, shall be deemed to have abandoned the right to occupy and use such streets, highways, and bridges; and the same may be occupied and used by any other company, duly chartered and obtaining the consent so to do, anything in any general or special act of Assembly or municipal ordinance to the contrary, notwithstanding," be and the same is hereby amended so as to read as follows:

Section 6. Any company which does not, within two years from the date of its incorporation, make formal application to the local authorities of the proper city, borough, or township for leave to occupy and use the streets, highways or bridges which, by its charter, it is authorized to occupy and use, and any company which heretofore has obtained or hereafter does obtain legislative or municipal consent to occupy and use any streets, highways, or bridges, and does not forthwith diligently proceed to occupy and use the same, and does not begin work within two years after such consent shall be obtained, and complete its road, *or a portion thereof, as herein provided, within the time limited by such consent, or any extension thereof*, shall be deemed to have abandoned the right to occupy and use such streets, highways, and bridges *not so used*; and the same may be occupied and used by any other company, duly chartered and obtaining consent so to do: *Provided, however, That no company shall be privileged to use any street temporarily abandoned, or the use of which is temporarily postponed, in accordance with the provisions of this act or of any other act of the General Assembly.*

Section 7. That section seventeen of the act of May fourteenth, one thousand eight hundred and eighty-nine, which reads as follows:

"Section 17. Any passenger railway company incorporated

under this act shall have, and is hereby granted, power by its officers and servants to ascertain and to define such route as they may deem expedient, over, upon and along any turnpike or turnpikes, not however exceeding sufficient width for two tracks to be laid down on, over and along such turnpike or turnpikes and thereupon, on, over and along such turnpike or turnpikes, to lay down, construct and establish a track or tracks for its use in the transaction of its business, and thereupon to use the same in its general business: *Provided, That before any such passenger railway company shall enter upon and use any of such turnpike or turnpikes in the laying of tracks and use of the same, it shall make compensation to the owner or owners thereof for such occupation and use of said turnpike or turnpikes, in the mode provided in section fourteen hereof,*" be and the same is hereby amended so as to read as follows:

Section 17. Any passenger railway incorporated under this act shall have, and is hereby granted, power, by its officers and servants to ascertain and define such route as they may deem expedient, over, upon, *across* and along any turnpike or turnpikes, *or portion thereof, not already occupied, and not, however, exceeding sufficient width for two tracks to be laid down on, over, across and along such turnpike or turnpikes, or portion thereof;* and thereupon, on, over, *across* and along such turnpike or turnpikes, *or portion thereof,* to lay down, construct and establish a track or tracks for its use in the transaction of its business; and thereupon to use the same in its general business: *Provided, That the consent of the owners of the underlying fee shall have first been obtained: And provided further, That before such passenger railway company shall enter upon and use any such turnpike or turnpikes, or portion thereof, in the laying of tracks and the use of the same, it shall make compensation to the turnpike company for such occupation and use of said turnpike or turnpikes, or portion thereof. In case the parties cannot agree as to the amount of compensation to be paid, then the Court of Common Pleas of the proper county, upon the petition of the corporation seeking the privilege, shall appoint five persons to view the premises, and assess the compensation for the use of such turnpike or turnpikes, or portion thereof. The jury so appointed shall hear the testimony, and shall make a report*

to the court, assessing the damages which the said turnpike company shall be paid for the use of the said turnpike road, or portion thereof; and if no appeal shall be taken from the said report, the court shall, at the expiration of thirty days, confirm the said report; and the amount so fixed by the jury shall be forthwith due and payable: Provided, however, That either party shall have the right of appeal, within the said thirty days, from the award of the jury, as now provided by law. If the corporation seeking to use said turnpike road or portion thereof shall be dissatisfied with such award, and shall appeal therefrom, it shall nevertheless have the right to immediately use the same, upon paying the amount of such award into court, to await the determination of such appeal. If such turnpike company shall appeal from such award, the corporation seeking to use such turnpike road, or portion thereof, shall enter security in such amount as the said court shall direct and approve; whereupon, such security being entered, the company so entering the same shall have the right to the immediate use of such turnpike, turnpikes, or portions thereof.

Approved—May 3, 1905. P. L. 368.

AN ACT authorizing contracts between cities, boroughs, and townships, of the one part, and street passenger railway companies and motor power companies, of the other part; providing for the keeping of certain streets free from street railway tracks, by permitting the temporary relocation or abandonment of tracks already laid, or the postponement of the laying of tracks duly authorized, while preserving the rights of such company to resume the exercise of its said franchises upon the termination or breach of such contract.

Section 1. That in case the local authorities of any city, borough, or township shall deem it necessary for the public benefit and convenience to secure the removal of any street railway tracks already laid, or prevent the laying of such tracks already authorized to be laid, or to change the route of any street railway on any street or streets, or portion of a street or streets, within its corporate limits, and such purpose or purposes can be accomplished by agreement with the street passenger railway company or motor power company owning, leasing or operating such tracks, it shall and may be lawful for the said parties to enter into a contract, for a period not exceed-

ing fifty years, for such considerations and upon such terms and conditions, and containing such stipulations, reservations and covenants as may be agreed upon between the respective parties thereto; and such contract may include a covenant providing that, during the continuance thereof, municipal consent shall not be granted to any other company to use or occupy the street, streets, or portions of a street or streets, covered by such contract, for street railway or passenger transportation purposes; which covenant shall be enforceable by bill in equity against such city, borough, or township, in case of attempted breach thereof; and such contract may also provide for the laying or relaying of such tracks, upon such terms and under such contingencies and conditions as may be agreed upon. When such contract shall have been made, it shall form a part of the charter of the company, with like force and effect as to all its terms, conditions, stipulations, restrictions, covenants, and provisions as to change of routes as if the same formed a part of the original charter of such company; and no removal of tracks already laid, or postponement of or delay in the time of beginning or completing the work of laying tracks already authorized to be laid, and no change of route therein provided for, shall operate or be construed to deprive or divest any such company, entering into such contract, of any of the rights, franchises or privileges possessed by it at the time of entering into such contract, so as to operate in favor of any company subsequently formed and seeking to occupy, for street railway purposes, the street, streets, or portions of a street or streets, covered by such contract: Provided, however, That nothing in this act contained, nor any contract made in pursuance thereof, shall be construed to limit or affect in any way, or impose any additional liability for the exercise of, the right of a steam railroad company to lay its tracks over, upon, under, and across such street or streets, or portions thereof.

Section 2. All laws and portions of laws, whether special or general, in so far as the same may be inconsistent herewith, are hereby repealed.

Approved—May 3, 1905. P. L. 379.

FORMS.

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Company.

Election Return Authorizing an Increase of

RESOLUTIONS OF THE BOARD OF DIRECTORS.

Pa., 190

I HEREBY CERTIFY that the following resolutions were adopted by a majority of the entire board of directors of the Company at a meeting held at the principal office of the company on the day of , 190 :

“Resolved, That the of this company be increased from \$ to \$;

“Resolved, That a meeting of the stockholders be called to convene at the general office of this company on the day of 190 , to take action on approval or disapproval of the proposed increase of the of this company, and that the secretary be and is hereby directed to give notice thereof as required by law.”

Attest:

Secretary.

[SEAL]

COMMONWEALTH OF PENNSYLVANIA, }
County of } ss:

being duly sworn, or affirmed, doth depose and say, that he is of the Company; that a notice, of which the above is a copy, was published in the , a newspaper of general circulation, printed and published in the

county of _____, Commonwealth of Pennsylvania, once a week, for sixty days, commencing on the _____ day of 190 .

Sworn to, or affirmed, and subscribed before me, this day of _____ A. D. 190 .

[SEAL]

.....

OATH OF JUDGES.

COMMONWEALTH OF PENNSYLVANIA, } ss:
 County of _____

On this _____ day of _____ A. D. 190 , personally appeared before me, a _____ in and for the county aforesaid _____, stockholders, duly appointed judges, by the board of directors of the _____ Company, to conduct an election of said company to be held on the _____ day of _____, 190 , who being duly sworn, or affirmed, do depose and say that they will well and truly, according to law, conduct said election to the best of their ability, and true return make of the same.

..... }
 } Judges.

Sworn to, or affirmed, and subscribed before me, the day and year aforesaid.

.....

[SEAL]

JUDGES' RETURN.

We, the undersigned judges, appointed by the board of directors of the _____ Company to conduct an election by the stockholders thereof, for or against an increase of the _____ of the said company from \$ _____ to \$ _____, do hereby certify, that after being duly sworn, or affirmed, we held the said election on the _____ day of _____ 190 , at the office of the

said company, the time and place fixed for holding the same, of which sixty days previous notice by publication was duly given, and in due form and manner we received the votes of the stockholders of the said company in favor of or against such increase. And at the said election there were voted in favor of such increase shares, and against such increase shares, thereby evincing the consent of the persons or bodies corporate, holding the larger amount in value of the capital stock of the said company, to the said increase.

..... }
 } Judges.

190 ,

ENDORSEMENT.

.....

Name of corporation.

ELECTION RETURN.

Authorizing

.....
 Filed in the Office of the Secretary of the
 Commonwealth, on the day of A.
 D 190 .

.....
 Deputy Secretary of the Commonwealth.
 Recorded in Miscellaneous Corporation Rec-
 ord Book, No. , page.

The fee for filing this paper is \$30.00.

2 Form of Street Railway Mortgage.

FIRST MORTGAGE.

LOAN OF \$500,000.

THIS INDENTURE, Made the day of A. D.

190 , between the Street Railway Company, a corporation of the State of Pennsylvania (hereinafter called the "Railway Company"), party of the first part, and the Trust Company, a corporation of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part, WITNESSETH:

THAT WHEREAS, The said Railway Company is a corporation chartered by the Act of General Assembly of Pennsylvania, entitled "An Act to provide for the incorporation of and government of street railway companies in this Commonwealth" approved May 14, A. D. 1889, and its supplements.

AND WHEREAS In and by the said act the said Railway Company has power to borrow money and issue bonds and secure the payment of the same by a mortgage on its road, property and franchises.

AND WHEREAS The said Railway Company under the powers conferred upon it by the said Act of Assembly and in accordance with the determination of a majority of its stockholders has located its railway and has begun the construction of the same, and has acquired rights of way and the consent of the municipal authorities.

AND WHEREAS, A statement of the President of the said railway company, accompanied with the oath of the president and engineers as to the payment of the capital stock of the said company as required by the Act of May 7, 1887, entitled "An Act to enforce against railroad corporations the provisions of Section 77, Article xvi of the Constitution," has been filed in the office of the Secretary of the Commonwealth.

AND WHEREAS, In and by the act of the General Assembly of Pennsylvania entitled "An Act to Provide for Increasing the Capital Stock and Indebtedness of Corporations," approved February 9, 1901, it is enacted that "the capital stock or indebtedness, or both, of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of the corporation. Such increase of either may be made at once, or from time to time, as the stockholders aforesaid shall determine."

AND WHEREAS, At a meeting of the Board of Directors of the said Company, duly called and held on the day of A. D. 190 , the following resolutions were adopted by majority of the entire number of the said Board of Directors, being a quorum thereof, viz:—

“RESOLVED, That it is the purpose of the Company to increase its indebtedness from nothing to the amount of \$500,000, being the amount necessary to accomplish and carry on and enlarge the business and purposes of the corporation.

“AND RESOLVED, FURTHER, That the question of such proposed increase shall be submitted to the stockholders of the said Company, for their consent, at a special meeting of the stockholders, which is hereby called to convene at the chief office or place of business of the company in on the day of A. D. 190 , at P. M., or such other place and time as may unanimously be agreed upon by the stockholders of the said Company; PROVIDED, that all the stockholders of the said Company shall by instrument in writing signed by them agree upon the place and time of the meeting and waive the sixty days’ notice of the meeting required to be given by Article 16, Section 7, of the Constitution of the State of Pennsylvania, and by Section 2 of the Act of the General Assembly of Pennsylvania entitled ‘An Act to provide for increasing the Capital Stock and Indebtedness of Corporations,’ approved February 9, 1901, as well as all other notice required by law.”

AND WHEREAS, All the stockholders of the said Company by instrument in writing, signed by them, agreed upon the place and time of the said special meeting and waived the sixty days’ notice of the said special meeting required to be given as aforesaid;

AND WHEREAS, The special meeting thus called was duly held on the day of at P. M., and at the said meeting all the stockholders of the Company were present in person or by proxy, and an election of the stockholders was taken for or against the said proposed increase, which was conducted by three judges, stockholders of the said corporation, appointed by the Board of Directors to hold the said election, and all of the said judges respectively took and sub-

scribed an oath or affirmation, before an officer authorized by law to administer the same, well and truly and according to law to conduct such election to the best of their ability; and when the said election was closed the said judges counted the number of shares voted for and against such increase; and at the said election all the stockholders of the Company, viz.: holders of shares of stock amounting at par to _____, having voted all their shares by ballot, in the manner required by law, for such increase, the said judges declared that the persons and bodies corporate holding the larger amount of stock of such corporation had consented to such increase; and the said judges made out duplicate returns of the said election, stating the number of shares of stock that voted for such increase, and that no shares of stock voted against such increase, and subscribed and delivered the same to the President of the Company;

AND WHEREAS, The said _____ Company has filed, in the office of the Secretary of the Commonwealth of Pennsylvania, one of the copies of the said return of the said election at the said special meeting, with a copy of the said resolution and waiver of notice calling the same thereto annexed;

AND WHEREAS, At the said meeting of stockholders the following resolution was also unanimously adopted, viz.:—

“RESOLVED, That an issue of bonds of this Company to the amount of \$500,000—being the total amount of indebtedness of this Company this day authorized—bearing interest at the rate of five per cent. per annum, and payable in _____, is hereby authorized; and that a mortgage in such form as may be approved by the Board of Directors, shall be executed to secure the said issue of bonds upon all the railroad property and franchises of this Company which it now owns or may hereafter acquire.”

AND WHEREAS, At a meeting of the board of directors of the said _____ Company, duly called and held on the _____ day of _____, after the adjournment of the said special meeting of stockholders, at which meeting of the board all the members of the board were present, the following resolution was unanimously adopted, viz.:—

“RESOLVED, That, in pursuance of the authority and power given to this company in its charter and in execution of the resolution of the stockholders of this company adopted at

the special meeting of the stockholders held this day, this company shall forthwith create and issue bonds for each, to be known as its 'First Mortgage 5 per cent. 30-Years Gold Bonds,' numbered from No. 1 to No. 500, both inclusive, and in general form and substance as follows, viz. :—

“ ‘UNITED STATES OF AMERICA.

“ ‘No. *State of Pennsylvania.* \$1000.

“ ‘COMPANY.

“ ‘First Mortgage 5 per cent. 30-Years Gold Bond.

“ ‘Loan of \$500,000.

“ ‘The Company, a corporation of the State of Pennsylvania, for value received hereby acknowledges itself to be indebted to the Trust Company, or the bearer, or, if this bond is registered, to the registered holder hereof, in the sum of ONE THOUSAND DOLLARS in gold coin of the United States of America of the present standard of weight and fineness, which sum the said Company promises to pay at the office of the said Trust Company, in the City of , on the first day of May, A. D. 1932, in gold coin as aforesaid, with interest thereon from the first day of May, A. D. 1902, at the rate of 5 per cent. per annum, payable semi-annually in gold coin as aforesaid, at the office of the said Trust Company, in the City of , on the first days of May and November in every year, on the presentation and surrender of the annexed coupons as they severally mature, and without deduction from either principal or interest of any tax or taxes which the said Company may be required to pay or to retain therefrom by any present or future laws of the United States or of the State of Pennsylvania or any other State the said Company hereby agreeing to assume the payment of all such taxes.

“ ‘This bond is one of a series of five hundred bonds, amounting in the aggregate of Five Hundred Thousand Dollars, numbered from No. 1 to No. 500, both inclusive, each for One Thousand Dollars, and all of like date, tenor and effect;

and is entitled to the security to be derived from a certain mortgage bearing even date herewith, executed and delivered by the said Company to the said Company as Trustee, and secured upon all the railroad property and franchises of the said Company, now owned by the said Company or hereafter to be acquired by it—to which mortgage reference is hereby made for the terms and conditions upon which this bond is issued and secured, for the nature and extent of the security and the rights of the holders of said bonds under the said mortgage, and for a description of the said corporate franchises, real and leasehold estate.

“This bond is further secured by a sinking fund which the said Company is to provide by paying or delivering annually, on the first day of August in every year, beginning with the first day of August, A. D. 1903, to the said Trustee, the sum of \$ in gold coin as aforesaid, or in bonds secured by the said mortgage at par.

“This bond is subject to redemption by operation of the said sinking fund on the first day of November in any year after the first day of August, A. D., 1903, at par and eight per cent. premium thereon and accrued interest, in accordance with the terms of the said mortgage.

“This bond is also redeemable on the first day of May or November in any year before maturity, at the option of the said Company, at par and per cent. premium thereon and accrued interest, in accordance with the terms of the said mortgage.

“This bond shall pass by delivery or by transfer on the books of the said Company, Trustee, and its successors for the time being in the trust created by the said mortgage as Registrar hereby and by the said mortgage appointed for the registration and transfer of all bonds of this series; but, after a registration of ownership certified hereon by the said Registrar, no transfer except on its books, shall be valid unless the last preceding transfer shall have been to bearer, and transferability by delivery has been thereby restored, but this bond shall continue to be susceptible of successive registrations at the option of its holder, and the registry shall not restrain the negotiability of the coupons by delivery merely.

“This bond shall not become obligatory until it has been

authenticated by a certificate endorsed hereon and duly signed by the said Trustee.

"*In Witness Whereof*, The said Company has caused these presents to be signed in its name by its President, and sealed with its corporate seal attested by its Secretary, and coupons for said interest bearing the engraved signature of its Treasurer to be attached hereto this day of A. D. 190 .

" " COMPANY,
" "By
" "President.

[CORPORATE SEAL]

Attest:

" "Secretary.

"With coupons attached thereto for semi-annual interest to become due on the said bonds, bearing the engraved signature of the Treasurer of the Company, and in general form and substance as follows:—

"On the first day of the Company will pay to bearer, on surrender of this coupon, at the office of the Trust Company, in the City of , for six months' interest on its First Mortgage 5 Per Cent. 30-Years Gold Bond No. the sum of Thirty Dollars in gold coin of the United States of America of the standard of weight and fineness fixed by the said bond.

" "Treasurer."

"And having endorsed on each of the said bonds a certificate of the Trustee in general form and substance as follows:—

" "(Trustee's Certificate.)

"The undersigned, the Trust Company, Trustee, hereby certifies that this bond is one of a series amounting in the aggregate to the sum of Five Hundred Thousand Dollars described in the within-mentioned mortgage.

" " TRUST COMPANY, TRUSTEE,
" "By

" "President."

"AND RESOLVED FURTHER, That, in order to secure the payment of the said bonds, this company shall make, exe-

cute, acknowledge, and deliver to the Trust Company a mortgage of all the railroad property and franchises of this company, now owned by this company or hereafter to be acquired by it, which said mortgage shall be and is hereby declared to be a continuing lien to secure the full and final payment of all bonds so to be issued, not exceeding in the aggregate the sum of Five Hundred Thousand Dollars, and shall be for the benefit and security of and in trust for the holders of the said bonds, without preference, priority, or distinction as to lien or otherwise of any over another, but so that each and all of the said bonds to be issued as aforesaid shall have the same right, lien, and privilege under and by virtue of the said mortgage, and shall be all equally secured thereby.

"AND RESOLVED FURTHER, That this company shall acknowledge the said mortgage by attorney, and that be and he is hereby appointed the attorney for this company and authorized and directed for it, and in its name and as and for its corporate act and deed to acknowledge the said mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgments to the intent that the same may be duly recorded; and that the appointment of the said attorney be embodied in the said mortgage;

"AND RESOLVED FURTHER, That the president of this company be and is hereby authorized and directed, for and on behalf of this company, and for and as its act and deed, to sign in the name of this company the said bonds and mortgage, to affix thereto the corporate seal of this company, and to cause the said seal to be duly attested by the secretary of this company; and when the said mortgage shall have been so signed, sealed, and attested, and acknowledged by the attorney this day appointed for that purpose, then to deliver and record the same;"

AND WHEREAS, At the said meeting of the board of directors the form of this mortgage was submitted to the said board of directors, and it was unanimously

"RESOLVED, That the mortgage to be executed, acknowledged, delivered, and recorded for and on behalf of this company, as this day authorized and directed by this board, shall be in the form now submitted, which form is hereby adopted

and approved, and ordered to be set forth at length upon the minutes of this meeting;"

AND WHEREAS, The said Company, in pursuance of the said resolutions and of the laws of the State of Pennsylvania, the said company in that behalf enabling, and of all and every legal power and authority in it vested, proposes forthwith to make, execute, issue, and negotiate bonds or obligations in the form substantially as hereinbefore set forth to be known as its "*First Mortgage Five per cent. Thirty Years Gold Bonds*," to the amount hereinbefore mentioned, not to exceed in the aggregate the sum of five hundred thousand dollars (\$500,000);

NOW, THEREFORE, The Said Company, in consideration of the premises and of one dollar (\$1) to it paid by the said Trust Company, party of the second part, and for the purpose of securing the payment of the principal and interest of all of said bonds when and as the same shall become due and payable, according to the tenor and effect thereof, has granted, bargained, sold, assigned, transferred, set over, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, assign, transfer, set over, release, convey, and confirm unto the said Company, party of the second part, and to its successor or successors in the trusts hereby created, and to its and their successors and assigns forever:—

All and singular the line of its railway as the same is now located, beginning, &c.

TOGETHER with all other extensions, branches, and relocations of the said lines of railroad, all power houses and other buildings, structures, plants, machinery, equipment, rights of way, roadbed, superstructure, tracks, turnouts, sidings, switches, bridges, poles, wires, overhead line work, rolling stock, tools, implements, fuel and materials of the said Railway Company now owned or which may hereafter be acquired for constructing, maintaining, operating, repairing, replacing, or improving the said line of railway and its appurtenances, or any part thereof, or in or for the business of the said line of railway, and all other property, real and personal, now owned or which may hereafter be acquired for the purposes of the said railway company or its business with the proceeds of bonds issued under and secured by this deed of trust or mortgage.

AND TOGETHER WITH all the rights, privileges, and franchises of the said Railway Company, including its franchises to be a corporation.

AND TOGETHER WITH all the streets, ways, passages, waters, and water courses, easements, rights, liberties, privileges, hereditaments and appurtenances whatsoever to any of the hereby granted premises belonging or appertaining or to belong or appertain, and the reversions, and remainders, rents, issues, and profits thereof and all the estate, right, title, interest, property, claim, and demand of every nature and kind whatsoever of the said Railway Company now owned and possessed or which may hereafter be acquired, as well at law as in equity, of, in, and to the same and every part and parcel thereof.

TO HAVE AND TO HOLD the said above described railway, property and franchises unto the said party of the second part and its lawful successor or successors and assigns forever, to and for the only proper use and behoof of the party of the second part and its successors and assigns forever.

BUT IN TRUST NEVERTHELESS, for the equal pro rata benefit and security of all and every the persons or corporations who may be or become holders of the said "First Mortgage Five per cent. Thirty-Years Gold Bonds" to the aggregate amount of three hundred and fifty thousand dollars, without preference, priority, or distinction as to the lien or otherwise of any over the other, and so that all of the said bonds issued and to be issued as aforesaid, and outstanding at any one time, shall have the same right, lien, and privilege under and by this deed of trust or mortgage, and shall all be equally secured hereby, with like effect as if they had all been made, executed, delivered, and negotiated simultaneously on the date hereof.

AND IT IS HEREBY EXPRESSLY COVENANTED AND AGREED, by and between the parties hereto, the said party of the first part covenanting not only for itself, but also for its successors and assigns, and the party of the second part covenanting not only for itself but also for its successors and assigns and its successor or successors in the trusts hereby created, that the said above described premises, property and appurtenances are to be held by the said party of the second

part upon and for the trusts, uses, and purposes following, that is to say:

First.—The Railway Company shall, contemporaneously with the execution and delivery hereof, make, execute, and deliver to the Trustee, and the Trustee shall certify or countersign bonds of the Railway Company intended to be secured hereby to an amount not exceeding in the aggregate three hundred and fifty thousand dollars, and in the general form hereinbefore set forth, and shall deliver the same so certified or countersigned to such person or persons as the board of directors of the Railway Company may by resolution designate. Until the said bonds can be lithographed or engraved, the Railway Company may execute and issue written or printed temporary bonds or obligations, in such form or forms, and in such amounts, as may be approved and be countersigned or certified by the Trustee; which temporary bonds shall be entitled to all the security hereunder, and be exchangeable for or convertible into the lithographed or engraved bonds to be issued hereunder, but the said temporary bonds shall be canceled by the Trustee upon such exchange or conversion being effected; and when bonds or obligations are countersigned or certified by the Trustee to the effect that they are issued under and secured by this deed of trust or mortgage, such certificate shall be conclusive evidence that said bonds or obligations have been issued in accordance with and are entitled to the security of this deed of trust or mortgage, whatever the form of such bonds or obligations may be.

Second.—The Railway Company shall hereafter, and until all the bonds hereby secured shall have been paid or redeemed, keep at its own expense, at its office or agency in the city of Philadelphia, an appropriate book, to be designated "Register of Street Railway Company's First Mortgage Five per cent. Thirty Years Gold Bonds," for the purpose of registry and transfer of the respective bonds, secured hereby, in accordance with the terms of said bonds, and every holder of bonds secured hereby shall be entitled to have his name and address and the number of any of the said bonds held by him entered therein, upon presenting at the said office or agency a written statement of the said particulars, signed by himself, and, if required, duly verifying his title to the said bonds, by the pro-

duction thereof, or upon written order, duly verified, of the person last registered as the holder. The Trustee shall have free access at all reasonable times to such bond registry, and shall from time to time, on request in writing, be furnished with a copy thereof.

Third.—In case any bonds issued hereunder become mutilated or destroyed, it shall be lawful for the Railway Company to issue new bonds of like tenor and date and bearing the same serial numbers, and the officers of the Railway Company for the time being may sign, and the Trustee, upon being fully indemnified, may certify the same for delivery in exchange for or in lieu of bonds so mutilated and destroyed.

Fourth.—Until default be made by the said Railway Company in the payment of the principal or interest of said bonds, or any of them, according to the tenor and effect of said bonds, and on the days and times mentioned in said bonds respectively, without deduction from either principal or interest for any tax or taxes which the said Railway Company may be required to pay or retain therefrom by any present or future laws of the United States or of the State of Pennsylvania or any other State—the said Railway Company having agreed and hereby agreeing to pay the same—or until default be made by the said Railway Company in respect to some other act or thing in any of said bonds or herein required to be done, kept, and performed, the said Railway Company shall be permitted to possess, manage, operate, use, and enjoy all and singular the premises hereinbefore described, with the appurtenances, and to receive, use, and dispose of the income therefrom.

Fifth.—If the Railway Company, its successors or assigns, shall, at any time hereafter, after demand made, make default, or refuse, neglect, or omit, for any period exceeding six months, to pay the semi-annual interest on the bonds intended hereby to be secured, or any of them, or shall, after demand made, make default, or refuse, neglect, or omit, for any period exceeding thirty days after maturity, to pay the principal sum of each and all of the said bonds intended hereby to be secured, or any of them, or shall suffer or allow any taxes or assessments to fall in arrear whereby the security of this deed of trust or mortgage may be impaired, or shall permit any lien to be filed or acquired or any charge to be created by any person or

corporation whereby the lien of this deed of trust or mortgage may possibly be divested, postponed, or otherwise impaired, or shall neglect or refuse to keep or perform any of the covenants and stipulations contained herein, or in the bonds secured or intended to be secured hereby, and on its part to be kept and performed, then and in either of such events the Trustee shall and will upon the written request of holders of a majority in amount of the bonds secured hereby and then outstanding, and upon adequate security and indemnity against all costs, expenses and liabilities to be by the Trustee incurred, or without such request or security or indemnity, it shall be lawful for the Trustee, in the Trustee's own discretion, forthwith to demand, and with such force as may be necessary to enter, take, and maintain possession of all and singular the railroad, property and franchises hereby conveyed and mortgaged, or agreed or intended so to be, and as the attorney in fact or agent of the Railway Company, and by the Trustee's agents and substitutes duly constituted, or by the Trustee's managers, superintendents, receivers or servants, have, hold, use, manage, operate, lease, and enjoy the same, and each and every part thereof, to as full an extent as the Railway Company might lawfully do, making from time to time all needful and proper repairs, alterations, and additions, and receiving all the rents, income, and revenue thereof, and after deducting the expenses of such use, operation, reasonable repairs, alterations, and additions, and the cost and charges of taking such possession and proper compensation for the services for such taking possession and management while in possession, and such sum or sums as may be sufficient to indemnify the Trustee against any liability, loss, or damage for or on account of any matter or thing done in good faith in pursuance of the duties of the Trustee, the Trustee shall apply the remaining net income and revenue therefrom, and also all sums of money which may have been paid to and are in the hands of the Trustee at the time of taking possession, as proceeds of property released, to the payment, without giving preference, priority, or distinction to one bond over another, of the full principal of and all accrued interest due on all of the said bonds outstanding and intended hereby to be secured, if the said income and proceeds be sufficient, but if not, then, without distinction between principal

and interest, pro rata; or the Trustee shall and will, after or without entering upon or taking such possession, upon the written request of holders of a like amount of said bonds then outstanding, and upon like security and indemnity, or without such request or security or indemnity in the Trustee's own discretion, the Trustee may proceed to sell and dispose of all and singular the said railroad, property and franchises hereby mortgaged, or agreed or intended so to be, to the highest and best bidder at public auction in the city of _____, or at such place as the Trustee shall appoint, having first given notice of the time and place of such sale by advertisement, published not less than once each week for ten successive weeks in one or more newspapers in the city of _____ and elsewhere at the option of the Trustee, or to adjourn the said sale from time to time in the Trustee's discretion, and if so adjourning, to make the said sale at the time and place to which the same may be so adjourned; and to make and deliver to the purchaser or purchasers of the said railroad property and franchises good and sufficient deed or deeds in the law in fee simple, freed from all and every the trusts hereby created, and without liability to see to the application of the purchase money, and without obligation to inquire into the necessity, expediency, or authority of or for any such sale; which sale, made as aforesaid, shall be a perpetual bar, both at law and in equity, against the Railway Company, and all persons claiming or to claim the said railroad, property and franchises, and any part thereof or any interest therein, by, from or through the Railway Company; and after deducting from the proceeds of such sale proper allowances for all expenses thereof, including attorney and counsel fees, and all other expenses, advances, or liabilities which may have been made by the Trustee for taxes or assessments on the said railroad, property and franchises; as well as reasonable compensation for its own services, it shall be lawful for the Trustee, and it shall be the Trustee's duty, to apply the residue of the money arising from the said sale to the payment of the full principal of, and all accrued interest on, all the said bonds which shall then be outstanding and unpaid, without giving preference, priority, or distinction to one bond over another if the said purchase money be sufficient, but if not, then pro rata, without distinction between principal and interest; and in the event of there

being in the hands of the Trustee any portion of the trust estate, or the proceeds thereof, after the payment in full of the principal and interest of the aforesaid bonds, then the Trustee shall reconvey, retransfer, or pay over the same to the Railway Company, its successors or assigns, for its sole use and benefit; or the Trustee shall and will, upon the written request of the holders of a like amount of said bonds then outstanding, and upon like security and indemnity or without such request or security or indemnity, in the Trustee's own discretion, the Trustee may proceed to protect and enforce the rights of the bondholders under these presents by a suit or suits in equity or at law, whether for the specific performance of the stipulated covenants and agreements, or any of them, contained herein on the part of the Railway Company, to be kept and performed, or in aid of the execution of powers herein granted or otherwise, as the Trustee being advised by counsel learned in the law shall deem most effectual to protect and enforce such rights—it being understood, and it is hereby expressly declared that the rights of entry and sale hereinbefore granted are intended as cumulative remedies additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatever to deprive the Trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents, according to the true intent and meaning thereof: PROVIDED ALWAYS, and it is hereby expressly declared and agreed, that no holder or holders of a bond, or of any bonds secured hereby, shall have the right to institute any suit, action or proceeding, in equity or at law, for the foreclosure of this indenture or the execution of the trusts hereof, or for the appointment of a Receiver, or for any other remedy, without first giving notice in writing to the Trustee of default having occurred and continued as aforesaid, and unless a majority in amount of the holders of bonds then outstanding have made requests in writing to the Trustee as above provided, and have afforded to the Trustee a reasonable opportunity to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in the Trustee's own name, and have also offered to the Trustee adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein

or thereby; and such notification, request, and offer of indemnity are hereby declared to be conditions precedent to the execution of the powers and trusts of this indenture, to any action or cause of action for foreclosure, to the appointment of a Receiver, or to any other remedy hereunder: AND PROVIDED ALSO, That neither the Trustee nor the holder or holders of the bonds intended to be secured hereby, or any of them, shall sell the premises hereby mortgaged, or intended so to be, or any part thereof, or institute any suit, action, or procedure in law or equity for the foreclosure hereof, or for the appointment of a Receiver, otherwise than in the manner herein provided.

Sixth.—It is further distinctly understood and agreed that in the event of the Trustee making such entry upon or taking possession of the railway, property and franchises hereby mortgaged, or agreed or intended so to be, or in the event of any sale thereof, either by the Trustee or by judicial proceedings, as hereinbefore mentioned, then and in either such case the whole principal sum of each and all of the said bonds then outstanding and intended hereby to be secured shall forthwith become due and payable, anything in said bonds or herein contained to the contrary notwithstanding; and in no other case, and for no other purpose, shall the principal sum of any of said bonds become due and payable before the date fixed in such bonds for the payment thereof, except when such bonds shall have been called for redemption, or when the principal sum thereof has been so declared to have become due and payable by the Trustee or by the holders of a majority in amount of the bonds then outstanding, in an instrument of writing under their hands and seals, after default in the payment of interest thereon continuing for six months after due demand therefor, and the Trustee, without any instruction from the bondholders, in the Trustee's own discretion, may in such case declare the principal sum to be due, or the holders of a majority in the amount of bonds then outstanding may in such case instruct the Trustee to declare the principal sum to be due, or waive, or instruct the Trustee to waive, the right so to declare on such terms and conditions as the said holders of a majority in amount may deem proper, and may annul and reverse a previous declaration made by the Trustee in that behalf: PROVIDED AL-

WAYS, And it is hereby declared that no such action of the Trustee or of the bondholders shall extend or be taken to affect any subsequent default or impair the rights resulting therefrom: AND PROVIDED ALSO, That it shall and may be lawful for the Trustee, when and as soon as the bonds then outstanding and hereby secured shall become due and payable according to the terms hereof, to proceed thereon to judgment and execution for the recovery of the whole amount of the bonds then outstanding and secured hereby, and all taxes and interest due thereon, together with an attorney's commission for collection, and the Trustee's charges, fees, and expenses, besides costs of suit, without further say, any law, usage, or custom to the contrary notwithstanding.

Seventh.—At any sale of the aforesaid railway, property and franchises, or of either or any part thereof, whether by virtue of any power herein granted or by judicial authority, the Trustee may bid for and purchase, or cause to be bid for and purchased, the same for and on behalf of all the holders of the bonds hereby secured and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price if but a portion thereof be sold, or, if the whole of said mortgaged premises should be sold, at a price not exceeding the total amount of such bonds outstanding, with the interest accrued thereon and the expenses of such sale. In case of a sale of the mortgaged premises or any part thereof, either by the Trustee or in the course of judicial proceedings, as hereinbefore provided, the purchaser or purchasers at such sale, in making payment of the purchase money and making settlement thereof, after making a cash payment sufficient to cover the costs and expenses of the sale and all other charges which must be provided for in actual cash, shall have the right to deliver and pay to the Trustee and turn in and use towards the payment of the purchase money any of the bonds or coupons held by him or them to or towards the payment of which the net proceeds of such sale shall be legally applicable—the amount of such bonds or coupons so to be paid in to be determined and fixed by the Trustee and at a sum which shall, upon a proper distribution and accounting for such proceeds, be at the least equal to the share or proportion payable out of such net pro-

ceeds to such purchaser or purchasers as the holder or holders of such bonds or coupons.

Eighth.—The Railway Company further covenants and agrees with the Trustee and the Trustee's successors that it will pay or cause to be paid all taxes, charges, or assessments imposed or assessed, or which may hereafter be imposed or assessed, upon its railroad, property and franchises covered by this deed of trust or mortgage; and will pay and discharge all claims of every name or nature which may hereafter become a lien upon the railroad, property and franchises hereby conveyed, or any part thereof, prior or superior to this indenture; and that when and as the interest coupons annexed to the bonds secured hereby become payable and are paid by the Railway Company, or by any person or corporation for or on its behalf, they shall be canceled; and that no purchase or sale of any of the said coupons or interest, separate from the bonds from which such coupons have been detached, or on which such interest shall accrue, and no advances or loan upon the same, and no redemption of any coupons or interest by or on behalf of the Railway Company shall as between the purchasers or assignees of such coupons or interest and the holders of said bonds, operate as keeping the said coupons or interest alive or in force as a lien upon the mortgaged premises; but all coupons or interest purchased, redeemed, or assigned, separate from the bonds from which such coupons are detached, or on which such interest shall accrue, shall at all times be subordinated in lien to and be paid only after payment in full of all the bonds issued hereunder, together with the coupons thereon and the interest due the holders thereof. The Railway Company hereby agrees to waive, and does hereby irrevocably waive, the benefit and advantage of any and all stay, exemption, extension, valuation and appraisement laws now existing, and which may hereafter be passed by the United States, or any of the States thereof, and all other laws now existing, and which may hereafter be passed by the United States, or any of the States thereof, which may or might prevent, postpone, hinder, or delay the exercise of the right of the Trustee to enter upon, operate, or sell the mortgaged railway property, and franchises, or any part thereof, or to commence or to continue any action or proceeding in regard thereto, or the exercise of any of the powers,

rights, privileges, and remedies of the Trustee or any of the bondholders under and in accordance with the provisions hereof; and the Railway Company hereby expressly covenants and agrees not to claim, set-up, or take the benefit or advantage of any such law or laws.

Ninth.—If at any time any portion (not part of the tracks) of the premises hereby mortgaged cannot be advantageously used in connection with the use or operation of said railway by reason of any change of location, change of track, or by reason of any other cause, the same may be exchanged for other lands, tenements, or hereditaments of equal value, or be sold, conveyed, or otherwise disposed of, and the trustee shall, if so requested, convey the same by release or otherwise; provided that any lands, tenements, or hereditaments acquired by exchange shall be conveyed to the Trustee for the further security of the said bonds of the Railway Company, free from any incumbrance or lien prior to these presents, as hereinbefore stipulated, and that the proceeds of any lands, tenements, or hereditaments so sold, conveyed, or otherwise disposed of, or a sum equal thereto, shall be paid or transferred to and held by the Trustee for the further security of the said bonds, free from any incumbrance or lien prior to these presents, until the same, or a sum equal thereto, shall have been used and applied by the Railway Company in the purchase of other lands, tenements or hereditaments, and until the same shall have been conveyed to the Trustee free from any incumbrance or lien prior to these presents, except as aforesaid, to be held by it hereunder as part of the mortgaged premises, for the further security of said bonds of the Railway Company hereby secured. The Railway Company may from time to time dispose of such of the equipment, rolling stock, machinery, and implements at any time held or acquired for the use of the said railroad hereby mortgaged as may have become unfit for such use, replacing the same by new of the value of that sold, which shall thereupon become under and subject to this mortgage, and shall also be expressly assigned to the Trustee, subject to this mortgage, on its demand. The sworn statement of the president and treasurer for the time being of the Railway Company may be received by the Trustee as sufficient evidence of any of the facts mentioned in this article, including the necessity for, or value

of, any property, and shall be full protection to the Trustee for any action taken by it on the faith thereof, but the Trustee may in its discretion require and act upon further or other evidence. Such release or conveyance by the Trustee shall pass to the purchaser or purchasers a title freed and discharged from the lien and operation of these presents; and from all and every of the trusts hereby created, and without any obligation on the part of the purchaser to see to or be responsible for the application of the purchase money given or paid therefor; and for the purposes of this provision, and to carry the same into effect, the Trustee is authorized to execute, acknowledge, and deliver, or join in executing, acknowledging, and delivering, such deed or deeds of release or conveyance as may be deemed advisable or necessary.

Tenth.—It is hereby covenanted, stipulated and agreed, by and between the parties hereto, and the trusts created by this instrument are accepted by the Trustee thereunder upon these express conditions, that the Trustee shall not be in any way or manner liable or responsible for or by reason of permitting or suffering the Railway Company to use and enjoy, retain or be in possession of all or any part of the railroad, property and franchises hereby granted and conveyed, or mentioned, agreed, and intended so to be; nor for any loss, injury, determination, deterioration, destruction, or damage which may be done, suffered, happen, or occur to said railroad, property and franchises by the Railway Company, its agents, servants, or employees, or any other person or persons whomsoever; nor for the result or consequence of any breach by said Railway Company, or its successors, of any of the covenants, stipulations, or agreements in this instrument contained; nor for any act or omission of the Railway Company, or its successors, agents, servants, or employees; nor liable to see to the application of the proceeds of any of the bonds secured hereby except as hereinbefore expressly stated; nor for any failure to file this instrument as a chattel mortgage; nor for any act, default, or misconduct of any agent or agents, or any other person or persons whomsoever, employed by the Trustee in or about the furtherance or administration of the trusts herein, unless the Trustee shall have been grossly negligent in the selection or continuance in employment of such agent or agents, person or persons; nor

shall the Trustee be answerable, except for the Trustee's own wilful default or gross negligence. And if the Trustee shall at any time exercise the rights, powers, and privileges in this instrument upon the Trustee conferred and enabling the Trustee to enter into possession of said mortgaged estates, rights, premises, and property, and use, manage, operate and control the same under the trust herein, the Trustee shall be indemnified out of the funds and property which shall so as aforesaid come into the Trustee's hands from and against all actions, suits, claims, and demands of whatsoever nature against the Trustee arising from or by reason of the negligence, carelessness or misconduct of the Trustee's officers, agents, servants, or employees. And in all cases the Trustee shall receive and be paid out of the trust estate just compensation for all services which the Trustee may render under and by virtue of the trusts created in this instrument, and shall be and is hereby authorized and empowered, at the expense of said trusts, to pay such reasonable compensation as the Trustee may deem proper to such attorneys, servants, and agents as the Trustee may reasonably employ in the management thereof. The Trustee may resign from the trusts herein created by the first giving notice in writing to the Railway Company, its successors or assigns, and to all bondholders whose addresses may be known to the Trustee, at least sixty days before such resignation shall take effect (or such shorter notice as may be accepted as sufficient), and upon the execution and delivery of a deed of conveyance and transfer to a successor in the trust if necessary; such notice so as aforesaid to be given to said bondholders to be to them given by notice sent by mail to their addresses as aforesaid.

Eleventh.—It is hereby further covenanted, stipulated and agreed by and between the parties hereto (and trusts created by this instrument are accepted by the Trustee thereunder upon the express condition) that the Trustee shall not be under any obligation to take any action towards the execution of the trusts herein which in the opinion of the Trustee will be likely to involve the Trustee in any expense or liability, unless and until some one or more, as the case may be, of the said bondholders or other person or persons in their behalf, shall, as often as reasonably required by the Trustee, give unto the Trustee good and sufficient indemnity against such expense or

liability, anything in this instrument contained to the contrary notwithstanding; but that it shall be the duty of the Trustee, upon receiving proper indemnification, and satisfactory to the Trustee, as herein provided, to take such proceedings at law or in equity as to the Trustee may seem expedient to enforce the rights of the bondholders under these presents upon requisition by said bondholders in writing, as in this instrument specified.

Twelfth.—The Railway shall and will make, do, seal, execute, deliver, and acknowledge, or cause to be made, done, sealed, executed, delivered, and acknowledged, all and every such further acts, matters, things, deeds, conveyances and assurances in the law for the better assuring, conveying, and confirming unto the Trustee all and singular the railroad, property and franchises hereby conveyed, or intended so to be, or which are hereby covenanted and agreed to be conveyed hereafter to the Trustee, as by the Trustee, or counsel learned in the law, shall be desired or required for the better effectuating and carrying out the provisions, objects and purposes of these presents and securing payment of the principal and interest of the bonds intended hereby to be secured; all of which railroad, property and franchises shall be held by the Trustee in, under, and upon the several and respective trusts, and for the use and purposes and subject to the powers and authorities herein mentioned, declared, given, and expressed.

Thirteenth.—If the Railway Company, its successors or assigns, shall and do well and truly pay, or cause to be paid unto the person or persons, bodies politic or corporate who shall become holders of the bonds intended to be secured hereby, the several and respective sums expressed therein on the day and time hereinbefore mentioned for payment thereof, together with the lawful interest of the same according to the provisions of the said bonds, or in accordance with the provisions hereof, and shall well and truly keep and perform all the stipulations, covenants, agreements, and things herein required to be kept and performed by the said Railway Company, according to the true intent and meaning of these presents, without any fraud or further delay, then and from thenceforth, as well this present indenture and the estate hereby granted and conveyed, or hereby agreed so to be, as the said recited obligations, shall become void and of no effect anything hereinbefore contained

to the contrary thereof notwithstanding, and satisfaction shall be forthwith duly entered by the Trustee upon the record of this deed of trust or mortgage, but otherwise the same shall be and remain in full force and virtue.

Fourteenth.—It is understood and agreed that the word "Trustee" and the words "party of the second part," when and as used in these presents, are intended to refer to and describe, and shall be construed to mean body or bodies corporate, or person or persons, which or who, for the time being shall be charged with the execution of the trusts of these presents, whether the same shall be the said party of the second part, or any successor or successors of the said party of the second part hereunder.

Fifteenth.—The recitals and statements of facts contained in these presents are made by and on behalf of the Railway Company, and the said Trustee assumes no responsibility for the correctness thereof.

Sixteenth.—The said Company does hereby constitute and appoint , to be its attorney, for it, and in its name, and as and for its corporate act and deed, to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

Seventeenth.—The said Trust Company hereby accepts the trusts herein created and covenants faithfully to execute the same. And the said Company does hereby constitute and appoint , to be its attorney for it, and in its name, and as and for its corporate act and deed, to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

IN WITNESS WHEREOF the parties hereto have caused this indenture to be signed in their respective names by their respective presidents, and sealed with their respective corporate seals, attested by their respective secretaries, the day and year first above mentioned.

By

Company,
President.

Secretary.

Attest :

By

President.
Company,

Attest :

Secretary.

STATE OF PENNSYLVANIA, }
COUNTY OF } *to wit:*

I HEREBY CERTIFY, That on this day of
in the year of our Lord , before me, the subscriber, a
notary public in and for the said State, and County, per-
sonally appeared , the attorney named in the foregoing
mortgage, for the Company, and by virtue and in pur-
suance of the authority therein conferred upon him acknowl-
edged the said mortgage to be the act and deed of the said
Company.

And I further certify and state that my commission as no-
tary public aforesaid expires on the day of A.
D. 190

WITNESS my hand and notarial seal, the day and year
aforesaid.

STATE OF PENNSYLVANIA, }
COUNTY OF } *to wit:*

I HEREBY CERTIFY, That on this day of
in the year of our Lord , before me, the subscriber, a
notary public in and for the said State, and County, per-
sonally appeared , the attorney named in the foregoing
mortgage, for Trust Company, and by virtue and in pur-
suance of the authority therein conferred upon him acknowl-
edged the said mortgage to be the act and deed of the said
Trust Company.

And I further certify and state that my commission as no-
tary public aforesaid expires on the day of A.
D. 190

WITNESS my hand and notarial seal, the day and year
aforesaid.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.

I, _____, prothonotary of the county of _____, and clerk of the Courts of Common Pleas, of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificates, DO CERTIFY That _____ whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a notary public for the Commonwealth of Pennsylvania residing in the county aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of deeds or conveyances for lands, tenements, and hereditaments in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in courts of jurisdiction as elsewhere, and that I am well acquainted with the handwriting of the said notary public, and verily believe the signature thereto is genuine, and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, this _____ day of _____ in the year of our Lord one thousand nine hundred and one.

Prothonotary.

COMMONWEALTH OF PENNSYLVANIA,

Recorded in the Office of the Recorder of Deeds of
County, in Deed Book No. _____, pages _____, on the
day of _____ A. D. 1901.

[SEAL]

Recorder of Deeds.

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